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A PRACTICAL TREATISE

ON

THE LAW

OF

COVENANTS FOR TITLE

BY

WILLIAM HENRY RAWLE, LL.D.

FIFTH EDITION

REVISED AND ENLARGED

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PREFACE

TO THE FIFTH EDITION.

Since the publication of the last edition, the law upon the subject of this treatise has been much amplified by judicial decision, and important legislation has been enacted upon the subjects of implied covenants for title, the form of covenants, covenants by married women, covenants running with the land, and the operation of covenants by way of estoppel. The last subject has, in particular, been carefully reconsidered in the eleventh chapter, and it is believed that a more comprehensive view of the law is now presented.

This growth of the subject has required the introduction of much new matter, but as the old has been condensed, the size of the volume is not increased.

To his former pupil, Mr. Charles Chauncey Binney, as also in part to Mr. Frederick M. Leonard, the author is indebted for efficient aid in the preparation of this edition.

Philadelphia, October, 1887.

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THE LAW

OF

COVENANTS FOR TITLE.

COVENANTS FOR TITLE.

CHAPTER I.

WARRANTY AND THE INTRODUCTION OF COVENANTS FOR TITLE.

§ 1. The introduction into general use of the "covenants for title" towards the close of the seventeenth century, in place of the feudal warranty, was one of the natural incidents of the change from the ancient to the modern system of law, which, having its rise about the end of the reign of Henry the Seventh, had, towards the latter part of that of Charles the Second, assumed something of a regular form. It is familiar that the principal features of this change, effected partly by statute and partly by gradual alteration of the common law, were the restoration of the right of devise, the abolition of military tenures, the disuse of real actions, the introduction of conveyances to uses, of the mode of trying title to land by ejectment, the enactment of the statute of frauds and perjuries, and the establishment of a regular system of equitable jurisdiction. With the disuse of real actions fell the law of warranty, which, from peculiar causes, had grown to be one of the most difficult subjects in the ancient system. And yet less than a century ago it was truly said by a learned writer: "Abstruse, and in most respects obsolete, as the learning respecting it unquestionably is, it continues to deserve the attention of every person who wishes to obtain accurate notions of those branches of our law which are more immediately connected with the doctrines which respect the alienation of landed property."[1] If this be true as to the English student, it is more emphatically true as to the American student. For although it would at first seem that the absence with us of the

[1] Butler's note to Co. Litt. 365 *a*.

law of primogeniture would of itself forbid the application of many of the incidents of the law of warranty, yet it will be found that to that law there has been, and is to this day, attached a practical importance on this side of the Atlantic which is denied at its home. A sketch of the law as it formerly existed cannot, therefore, be considered unnecessary.

§ 2. By the feudal constitution, homage and warranty were reciprocal. Long before the introduction of deeds, it was the law that, while the vassal should render homage to his lord for the fief received at his hands, the lord should protect the vassal in its enjoyment.[1] If, therefore, its title were disputed, and the lord, called on to warrant or insure it, failed so to do and the fief were lost, he was bound to furnish another of equal value.[2] This warranty was originally created without express contract of any kind, — it was simply a natural incident of tenure, and its effect was twofold: not only did it thus protect the vassal from the paramount title of others, but, what was perhaps of scarcely less consequence in those rude times, it protected him against any attempt of his lord to take back what he had parted with; in other words, the warranty operated as a rebutter, as it was termed, by barring the warrantor and his heirs from claiming any portion of the land.

§ 3. When, subsequently, it became usual to authenticate the transfer of land by charters or deeds, whether the latter did or did not contain the technical word *warrantizo*,[3] a warranty was

[1] 6 Bracton (Twiss), 15, 47, 81, 85; Gilbert's Tenures, 139; 1 Reeves's History of the Common Law (ed. 1869), 423.

[2] Wright, in his Introduction to the Law of Tenures, pp. 27–32, &c., seems to think this could only have been so in the case of improper feuds, so called, — viz., those which were sold or granted free of all service, — and that it was unlikely that where a feud was generously given, the lord should be held to make good its loss. The question has been much discussed by the civilians (see Butler's note to Co. Litt. 365), but the weight of authority, even at the time when Wright and Butler wrote, seems to be as stated above. In fact, the sources of the common law — not to this day traced with precise accuracy — were better known, or at least appreciated, both before and since the close of the last century. While it is familiar that Bracton, who wrote in the thirteenth century, drew much of his knowledge from the Roman law, — less perhaps from the original authorities themselves than from the *Summa* to the Code and Institutes by Azo, — yet it is at least doubtful whether, as has been contended (Güterbock, Bracton, 58 *et seq.*; 1 Spence, Eq. Jur. 10), the Roman law had an authority which, in the absence of custom or statute, was recognized and obeyed in England. The subject is partially considered in Judge Holmes's work, "The Common Law," and more fully in the first chapter of Judge Hare's recent treatise on Contracts.

[3] "And no other verb in our law," says Coke, "doth make a warranty, but *warrantizo* only." Co. Litt. 384 *a*.

implied from the word of feoffment *dedi*, and this was termed a warranty in law.[1]

§ 4. As early as the year 1276, the statute *de bigamis*[2] was declaratory of the effect attached by the common law to the use of this word. "In deeds where is contained *dedi et concessi* without homage, or without a clause that containeth warranty, and to be holden of the givers and their heirs by a certain service, it is agreed that the givers and their heirs shall be bound to warranty;"—"and even if there be," says Coke in his exposition of this statute,[3] "an express warranty in the deed, yet that taketh not away the warranty that is wrought by force of the word *dedi*, but the feoffee may take advantage either of the one or the other at his pleasure."[4] The warranty, therefore, which naturally flowed as part of the reciprocal consequences of feudal tenure, could not be modified by an express warranty.[5]

The second clause of the statute, however, modified the common law, by declaring that "where is contained *dedi et concessi*, to be holden of the chief lords of the fee or of others, and not of feoffors or of their heirs, reserving no service, without homage or without the foresaid clause, their heirs shall not be bounden to warranty, notwithstanding the feoffor during his own life by force of his own gift shall be bound to warrant;" in other words, where no tenure between the grantor and grantee was created by the gift, the word *dedi* implied a warranty merely by the donor during his life, and not one which would impose an obligation on his heirs.

§ 5. This was the first statutory alteration of the law of warranty. The second came but two years after. Every warranty which descended upon the heir of the warrantor was, as has been seen, operative to prevent the latter from recovering back the land against the warranty of his ancestor, and this whether he

[1] "Because in judgment of law they," that is, the words from which warranty is implied, "amount to a warranty, apart from the word *warrantizo*." Co. Litt. *supra*.

[2] 4 Edw. I. c. 6.

[3] 2 Institutes, 275.

[4] This is the earliest instance of statutory enactment giving a certain effect to the words of conveyance, and doubtless afforded the precedent for the statute of 6 Anne, c. 35, giving a certain effect to the words "grant, bargain, and sell," an act which has been copied more or less literally in many of the United States. See Ch. XII.

[5] That is to say, "if a man make a feoffment by *dedi*, and in the deed doth warrant the land against J. S. and his heirs, yet *dedi* is a general warranty during the life of the feoffor." Co. Litt. 384 *a*.

had or had not inherited from the latter other lands wherewith to meet the claim; in other words, whether he had or had not assets by descent.[1] Hence, if a tenant by the curtesy should alien his wife's land with warranty, this warranty would descend upon the eldest son, — for the law of warranty and the law which gave the inheritance to the eldest son were coeval, — and bar him from claiming the inheritance which he would otherwise have derived from his mother, and this though without assets from the father.[2] To remedy this flagrant injustice, the statute of Gloucester[3] was passed, which provided that "if a man alien a tenement that he holdeth by the law of England, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover, by writ of *mort d'ancestor*, of the seisin of his mother, although the deed of his father doth mention that he and his heirs be bound to warrant."[4] And it then went on to say, "And if any heritage descend to him of his father's side, then he shall be barred for the value of the heritage that is to him descended;" in other words, the warranty of a tenant by the curtesy would not bar the son, unless the latter had inherited other lands from the father, in which case he would be barred to the extent of their value. In every other case, however, warranty barred with or without assets by force of the common law.[5]

[1] "And it is to be understood that before the statute of Gloucester, all warranties which descended to them which are heirs to those who made the warranties were barres to the same heirs to demand any lands or tenements against the warranties, except the warranties which commence by disseisin." Litt. § 397.

[2] 2 Institutes, 292.

[3] 6 Edw. I. c. 3, A. D. 1278.

[4] It may be here mentioned, as showing the connection in this country between the law at the present day and the old law thus attempted to be sketched, that a rather recent case in Kentucky arose under an old statute there, which provided that, "If the deed of the alienor doth mention that he and his heirs be bound to warrant, and if any heritage descend to the demandant on the side of the alienor, then he shall be bound for the value of the heritage that is to him descended." A husband seised in right of his wife joined with her in the conveyance of her land by a deed which contained a covenant of warranty, but which, by reason of defective acknowledgment, was inoperative to pass her estate. After her death, the husband married again and died intestate; there were children of the second marriage, and his estate descended equally to both sets of children. The children of the first marriage brought ejectment to recover the land which had been their mother's, but, by force of the statute referred to, failed to recover it, on the ground that they had received assets by descent from their father to the full value of the land which he had conveyed with warranty. They then brought suit against the personal representative of their father, for payment, out of the whole of his estate, of the loss which his breach of warranty had caused to fall upon them alone, and in this they were finally successful. Todd *v.* Todd, 18 B. Monr. 144; *infra*, Ch. XI.

[5] On this subject, Blackstone says: "But though without assets the heir was

§ 6. The third statutory alteration came twelve years after, by the passage, in the year 1290, of the statute of *quia emptores*,[1] which, prohibiting subinfeudation by declaring that it should be lawful for every freeman to sell his lands at his own pleasure, and that the feoffee should hold the lands of the chief lord of the fee by such service and customs as his feoffor was bound to before, put an end to homage as an incident of tenure; and this having been the consideration of implied warranty, it hence resulted that the word *dedi*, in a conveyance in fee, thenceforward implied a warranty during the life of the donor, and no longer.[2]

As this statute thus took away that incident of tenure on which warranty depended, it was natural that express warranties, which, though sometimes employed before that time, were by no means generally used, should become almost universal.[3]

§ 7. But a few years before, in the year 1285, had been passed the celebrated statute *de donis*, which, for the next two hundred years, had a greater effect upon the law of warranty than has been generally considered, indirectly raising it to a height and giving to it an influence which probably it would never have

not bound to insure the title of *another*, yet in case of lineal warranty the heir was perpetually barred from claiming the land *himself*, for if he could succeed in such claim he would then gain assets by descent (if he had them not before), and must fulfill the warranty of his ancestor." 2 Black. Com. 302. To prevent misconstruction of this sentence, it must be borne in mind that Blackstone is here speaking of the common law, and in the first instance given is evidently referring to the case of an eviction of the feoffee by paramount title. The latter example is, of course, a plain case of rebutter, though the meaning would have been clearer if the word "lineal" had been omitted, as at the time of which he was writing there was but one species of warranty, — collateral warranty being then unknown. The great commentator is less clear upon this subject than upon most others.

[1] 18 Edw. I. c. 1.

[2] If, however, the conveyance left any reversion in the donor, the implied warranty still subsisted, since the donee still held of the donor as before the statute, and consequently the warranty bound not only the donor, but also his heirs, and therefore, "if a man make a gift in tail, or a lease for life of land by deed, or without deed, reserving a rent, or of a rent service by deed, this is a warranty in law, and the donee or lessee being impleaded, shall vouch and recover in value" (Co. Litt. 384 *b*; Fitzh. Nat. Brev. 134); and the burden of this warranty bound the heirs of the grantor and the assignees of the reversion, and its benefit enured to the assignees of the grantee.

[3] The form of which, as given by Bracton, was, "*Et ego et haeredes mei warrantizabimus tali et haeredibus suis tantum vel tali et haeredibus et assignatis et haeredibus assignatorum, vel assignatis assignatorum et eorum haeredibus et acquietabimus et defendemus eos totam terram illam cum pertinentiis, contra omnes gentes*" (Co. Litt. 383 *b*); and, as will be hereafter seen, this exact form is, with the addition of words of covenant, the form of the American covenant of warranty at the present day.

otherwise attained. Reciting that "when lands had been given to a man and his heirs begotten, upon condition that if he should die without such heirs it should revert to the giver or his heir, and that, after issue born, such feoffees had theretofore had power to alienate the lands so given and to disinherit their issue contrary to the minds of the givers, and contrary to the form expressed in the gift," it was declared "that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition *shall have no power to alien the lands so given*, but that it shall remain unto the issue of them to whom it was given after their death, or shall revert to the giver or his heirs."[1] And hence arose those estates known thenceforward and at this day as estates tail. The effect of this statute, by removing the estates of the greater lords beyond the penalties of forfeiture, and beyond liability for debts and incumbrances, swelled them to a height and gave them an immunity which was as hateful to the crown as it was to the trading and industrious classes. Nor was it less distasteful to the younger sons, who, in consequence of the inalienable nature of the estates thus created, were compulsorily without provision from their fathers, the tenants in tail, and it is common history that in every successive Parliament from Edward the First to Edward the Fourth, — a period covering eight reigns, and nearly two hundred years, — bills, "which," says Coke, "I have seen,"[2] were introduced to repeal the statute *de donis*, and were invariably rejected.

§ 8. But although there may have been cases in which tenants in tail were well satisfied that their estates should be inalienable, there were others who desired to part with them, and the question soon arose, how could this be done; and the judges, being the nominees of the crown, were willing enough to lend themselves to expedients. An analogy to the statute of Gloucester was soon found, for although the statute *de donis* had expressly said that the tenant in tail should "have no power to alien the lands so given," it came to be held, upon what they called "the equity of the statute of Gloucester," that a warranty of tenant in tail, with assets in fee simple descending upon the issue in tail, barred the

[1] 13 Edw. I. c. 1.

[2] Mildmay's case, 6 Rep. 40, where an interesting account of this subject is given.

latter, and of course passed a good title,[1] for it was considered that, although the statute had forbidden the alienation of the tenant, it had not taken away the force of the warranty.[2] But it was not every tenant in tail who had another estate in fee simple, or, if he had, might die seised of it, and this risk the purchaser was obliged to run, for if no assets should descend to the issue in tail he might be evicted by the latter. In every case, therefore, (and there must have been many,) in which the tenant in tail had no other estate than the one warranted, the warranty was powerless to help him. But the statute of Gloucester, though it had said that a warranty from a father to a son, or as it came afterwards to be called, a lineal warranty, would not bar the son without assets, yet was silent as to a warranty descending from any collateral ancestor, and therefore a warranty of a collateral ancestor, whose heir the issue in tail might be, descending upon the latter, would bind him without assets by force of the common law. Consequently, if a brother of the tenant in tail, who had nothing to say to it and who was collateral in respect of it, joined in this alienation with warranty and died without issue, so that the son of the tenant in tail became his heir, this warranty bound, as at common law, the issue of the tenant in tail; therefore, by getting a collateral relation whose heir the issue in tail was to be

[1] "And by the equity of this statute, the warranty of tenant in tail is no bar unless there be assets in fee simple descended." 2 Institutes, 293, implying, of course, conversely, that when there were such assets the warranty would bar (and see the cases cited by Coke in Mary Portington's case, 10 Rep. 37 *b*, 38; Litt. § 712; 2 Reeves's History, 200, 339). The word "analogy" should rather have been used than "equity," for the statute, being in derogation of the common law, should, according to the general rules of interpretation, have been construed strictly.

[2] 2 Reeves's History, 340. Mr. Butler says, in his note to Co. Litt. 373 *b*: "At common law the operation of a warranty to rebut the heir could hold in no case where the heir claimed the estate warranted from the ancestor by descent; for at the common law, whenever the ancestor had the inheritance, he could alien it from the issue; therefore the warranty, as to the purpose of rebutter, was perfectly inoperative. The statutes have made no alteration in these respects. The consequence is, that without assets the ancestor's warranty never did and does not now bind the heir in any case, except where he takes by purchase." The meaning of this is sufficiently obvious when considered in connection with the former part of the same note. When the ancestor was seised in fee and conveyed with warranty, the latter was useless (or, to speak more correctly, superfluous) to rebut an heir who took by descent, for the conveyance was, for that purpose, as effectual as the warranty, and if the ancestor were seised for life or years, it would, in most cases, have been a warranty commencing by disseisin, and therefore void; but though useless as a *rebutter*, a warranty bound the heir to insure the title warranted, to the extent of the assets descended; though, of course, without assets, he was not so bound.

to concur in the alienation and bind himself and his heirs to warranty, in particular cases the statute *de donis* was successfully evaded.[1] This is believed to be the true origin of collateral warranty, and to explain what is meant when it is spoken of as "a mode of common assurance."

It is true that all this was not done without opposition, for about a century after the statute *de donis* had been passed we find a petition of the Commons complaining that the warranty of a collateral ancestor was a bar though nothing descended from the ancestor, "which is a great damage and disinherison of many," and it prayed that no such warranty thenceforward to be made should be a bar in any action unless tenements to the value had descended on the demandant from such ancestor, according as it had been ordained by the statute of Gloucester,[2] but the application was not successful, and collateral warranty continued as before.

If the learning of collateral warranty has been called difficult and unsatisfactory, it is simply because the law of warranty, which in its origin partook of the simplicity of the early common law, came to be, at a time when the alienation of property was fettered by a statute whose repeal could not be effected, turned from the purpose of its introduction, — that of protection and defence, — and fashioned into a remedy to meet an entirely different purpose.

§ 9. But the time came when collateral warranty ceased to be used for the purpose of barring estates tail. Its use could never have been a universal one, for the obvious reason that it was not every tenant in tail who had collateral relations who could or would be used for that purpose, and the need of a more effective

[1] Litt. § 709. The reason given by Coke why the warranty of the uncle, who himself had nothing to do with the estate, should bar the issue in tail, is that "the law presumeth that the uncle would not unnaturally disinherit his lawful heir, being of his own blood, of that right which the uncle never had, but came to the heir by another meane, unless he would leave him greater advancement. And, in this case, the law will admit no proof against that which the law presumeth. And so it is of all other collateral warranties, for no man is presumed to do anything against nature."

[2] 50 Edw. III. Parliament Rolls, No. 68, Cotton's Ab. p. 126, 2 Reeves, 341; Coke thus refers to this: "It has been attempted in Parliament, that a statute might be made that no man should be barred by a warranty collateral, but where assets descended from the same ancestor, but it never took effect, for that it should weaken common assurances." Co. Litt. 373 *b*.

mode of common assurance was sufficiently evident. It may be unnecessary here to inquire particularly whether common recoveries were or were not used for this purpose before the decision in Taltarum's case[1] in the reign of Edward the Fourth. The theory of the validity of a common recovery to bar an estate tail depended in its origin on the law of warranty, for the tenant in tail, although judgment was recovered against him for the land, yet himself had judgment against a fictitious warrantor — or rather a real warrantor with fictitious means — to recover a recompense in lands of equal value, which, assuming their existence to be real, would go to the tenant in tail and his issue, in lieu of those recovered from him.[2] Such was the decision, or rather the *dictum*, in Taltarum's case,[3] and from that time at

[1] Year Book 12 Edw. IV. 19, A. D. 1473, translated in Tudor's Lead. Cas. Real Prop. (3d ed.) 695; and see Mr. Tudor's notes.

[2] That great lawyer, Lord Holt, said, in 1701 (Anon., 12 Modern, 513): "The true reason of collateral warranty was the security of purchasers and for their encouragement, as also for the establishing and settling the estates of such as are in by title or descent cast, and this was the only security such persons could have at common law. And because the estates of such persons as are in by title are much favored in law, these covenants that were for strengthening of them were favored likewise." And he is reported to have added, "And in those days there was no need of a lineal warranty; but, however, the force of that is taken away by the statute *de donis*, and *common recovery* is not upon the supposition of recompense in value, and never was within the statute, but always as much out of it as if it were so mentioned in express words." This sentence has gone through all the editions of Modern Reports, has been frequently quoted, and been passed *sub silentio*, even by very learned writers (see Butler's note, Co. Litt. 373 *b*). But, as thus reported, it is both contrary to the law, and in a measure insensible; for, first, the "recovery in value" was of the very essence of a common recovery, as is everywhere shown, from the opinion of Littleton, J., and Brian, C. J., in Taltarum's case, down (see Co. Litt. 372 *b*, &c.; Fearne's Posthumous Works, 449, &c.); and secondly, no one ever supposed that the statute *de donis*, in its origin, ever had anything to do with common recoveries. It was, therefore, suggested by Mr. A. T. Freedley (to whose assistance I was much indebted in the preparation of the fourth edition), that the words "common recovery" had been incorrectly copied instead of "collateral warranty," which, truly, was "not upon the supposition of recompense in value, and never was within the statute, but always as much out of it as if it were so mentioned in express words;" as must clearly appear from consideration of the opinion in Bole *v.* Horton, Vaughan, 375.

[3] Notwithstanding it has often been said in a general way that common recoveries were invented to bar estates tail, or were first applied to that purpose from the decision in Taltarum's case, yet the first of these suggestions is clearly wrong, and the second seems almost equally so. There is every reason to believe, and little reason to doubt, not only that the device of common recoveries was applied to bar estates tail long before Taltarum's case, but that that decision, instead of inventing a new remedy, was merely made for the purpose of confirming what had been more than once done before. The device itself was confessedly of ancient origin. So early as the statute of Gloucester, it was (c. 11) expressly forbidden to a landlord as against his tenant; and in the statute of Westmin-

least this certain, universal, and effective device, thus judicially recognized, became frequent — before long, it was openly acknowledged that the warranty and recompense in value were mere fictions — and common recoveries assumed the position which in England they have held until less than sixty years ago, and which in some of our States they hold to this day, among the common assurances of the law.[1]

§ 10. But nearly two centuries elapsed between the statute *de donis* and the decision in Taltarum's case, and it is easy to imagine that the doctrine of warranty, thus perverted from its original and simple purpose, should in the course of these years become involved in subtlety, for the rules which were held to apply in a fictitious case or were applied for a particular purpose must of course logically be held to apply in all cases.[2] And as to its illegitimate offspring, collateral warranty, which was a thing unknown in the earlier days of the common law, it was, said Chief

ster the Second, it was expressly forbidden to religious men thus to evade the statutes of mortmain. And Coke, in Mary Portington's case, 10 Rep. 37 *b*, says expressly, "The opinion that a recovery against a tenant in tail with voucher would bar an estate tail and was not restrained by the statute *de donis*, was not newly invented in 12 Edw. IV., but often affirmed for law by the most knowing of the law that ever were." When, then, it is said that Taltarum's case was the origin of this practice, it is more correct to say (and this is no doubt what many learned authors mean) that that decision first judicially sanctioned it. See Pigot on Recoveries, 9; Reeves's History of the Common Law (ed. 1869), c. 21; and in particular Finlason's Notes to Reeves, pp. 75, 552, &c., a book in which the annotator persists in trying to correct his author, and in which a proper index is sadly deficient.

Taltarum's case was, as Pigot says, "cunningly managed," for it seemed to be an adverse judgment, being against the recovery, and it was only from the argument of the judges that it appeared that they all thought that if, in the case at bar, the tenant *had been* actually seised (which he was not), the recompense would have descended, and the issue in tail been barred. "Such a piece of solemn juggling," says a very able modern writer, "could not long have held its ground, had it not been supported by a substantial benefit to the community." Williams on Real Property, 44. And the case itself was but part of what was even then beginning to be an old story, — the contest between the crown and its nominees the judges on the one side, and the lords on the other, and not the less a contest between the commons and the lords.

[1] So that it has long been settled that the right to suffer a common recovery is a privilege *inseparably incident* to an estate tail, and one which cannot be restrained by condition, limitation, custom, recognizance, statute, or covenant. See the argument of Mr. Knowles in Taylor *v.* Horde, 1 Burrow, 84; Dewitt *v.* Eldred, 4 Watts & Serg. (Pa.) 421.

[2] And hence the doctrine that a warranty commencing by disseisin was void. Co. Litt. 366 *b*. Otherwise, a tenant for years or at will might have passed a good title by force of the warranty to the exclusion of the reversioner, and the rule was express that a conveyance for valuable consideration, in the form of a feoffment with warranty, was, before the statute of uses, inoperative unless livery of seisin were made.

Justice Vaughan, "an extraction out of men's brains and speculations many scores of years after the statute *de donis;*"[1] and he continues, "If Littleton had taken the plain way of resolving his many excellent cases in his chapter of warranty, by saying the warranty of the ancestor does not bind in this case because it is restrained by the statute of Gloucester or the statute *de donis*, and it doth bind in this case as at the common law because not restrained by either statute, his doctrine of warranties had been more clear and satisfactory than it now is, being intricated under the terms of lineal and collateral; for that in truth is the genuine resolution of most if not all his cases; for no man's warranty doth bind, or not, directly and *a priori* because it is lineal or collateral, for no statute restrains any warranty *under those terms* from binding, nor no law institutes any warranty *under those terms*."

The next statute which restrained the operation of warranty was that of 11 Hen. VII. c. 20, passed in 1494, which declared that certain alienations made by the wife of the lands of her deceased husband should be void; that is to say, that all warranties by a tenant in dower, or for term of life, or in tail, jointly with her husband, or only to herself, or to her use in his lands, made by her after the husband's death, should be void unless with the consent of those entitled after his death, and such conveyance, moreover, worked a forfeiture of her estate.

The next and last restraining statute was that of 4 & 5 Anne, c. 16, which provided that all warranties made by any tenant for life of any lands descending or coming to any person in reversion or remainder should be void, and all collateral warranties by any ancestor who had no estate of inheritance in the same should be void against the heir.[2]

And finally, by a statute passed in 1834, based upon the recommendation and report of the Real Property Commissioners, warranties, with all other real actions, were abolished.[3]

[1] Vaughan's Rep. 375 *b*. It will be remembered that Littleton wrote about the year 1475, when the doctrine of collateral warranty was at its height.

[2] § 21. This was the familiar statute "For the amendment of the law and the better advancement of justice," A. D. 1705. It was the first statute in which the words "collateral warranty" were used. As will be hereafter seen, this section has been re-enacted more or less literally in many of the United States.

[3] 3 & 4 Will. IV. c. 27, § 39; id. c. 74, § 14. The evidence taken before this commission is interesting and instructive.

§ 11. But although the organic doctrines of the law of warranty are important to be known, it is hardly so with respect to the remedies by which they were enforced, and only a brief reference to them will be made.

It is familiar that these remedies were two: by writ of voucher to warranty, and by writ of *warrantia chartæ*. There were certain real actions[1] in which if one who had received a warranty were impleaded he had the right by a *summoneas ad warrantizandum* to bring in his warrantor as the real party to the action, and thus make him defend the title, and the process itself was called "voucher." The effect of this was that the same judgment which deprived the warrantee of that which had been conveyed to him was also a judgment in his favor against the warrantor, giving him a right to other lands of equal value to those which had been lost. But there were other real actions in which the warrantee had not the right thus to vouch,[2] and in these cases he brought his writ of *warrantia chartæ* whereby in effect the same end was reached.[3] Nor in the case when *warrantia chartæ* was the proper remedy was it necessary that the warrantee should have been impleaded. The action could be, and often was, brought *quia timet implacitari*, as a mere precautionary measure, as soon as there was reason to fear the loss of the land through a defect of title;[4] and the judgment then obtained, called a judgment *pro*

[1] Such as *mort d'ancestor*, writ of right of an advowson, writ of admeasurement of pasture, writ in right of ward, &c. Viner's Abr. Voucher, Q. And the summons always mentioned the form of action in which the defendant was impleaded.

[2] Such as a writ of dower, a writ of assize, a writ of entry in the nature of an assize, a *quare impedit*, a *scire facias*, or a fine, &c.; and when one *might* vouch and did not, he was not allowed a *warrantia chartæ;* Viner, *supra;* Fitzh. Nat. Brev. 314, 412; and see also both as to voucher and *warrantia chartæ*, 1 Reeves's History, 422, 430.

[3] The form of this writ was thus:—

"The King to the Sheriff, Health. Summon, by good Summoners, W., so that he be before me or my Justices, there on a certain day to warrant to R. one Hyde of Land, in such a Vill, which he claims as his Gift, or the Gift of M. his Father, if he will warrant it to him, or to shew wherefore he ought not to warrant it to him; and have the Summoners and this writ. Witness, Ranulph," &c. Granville (Beames's ed.), 75. Ranulph de Granville, the reputed author of this treatise, was, it will be remembered, Chief Justice in Henry II.'s reign, and the writs ran of course in his name. The publication of the Fines by the Record Commission, in 1835, has cast some additional doubt as to this authorship; see Preface to Book of Fines, p. 16.

[4] "And a man may sue forth this writ of *warrantia chartæ* before he be impleaded in any action, but yet the writ doth suppose that he is impleaded; and if the defendant appear and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his warranty, so as if the defendant be *after* impleaded and

loco et tempore, bound all the lands of the warrantor,[1] and when the loss actually did occur, then by means of a *scire facias* on this judgment the warrantee was entitled to have execution of all the lands and tenements which the defendant had at the time of the judgment,[2] provided however that, in case of a suit brought *after* the judgment *pro loco et tempore*, the warrantee had, as by analogy to voucher, notified the warrantor and requested him to defend.[3]

vouch him to warranty, and he entereth into the warranty and pleadeth and loseth, and that the defendant recover in value, the defendant shall have in value of the lands against the vouchee which he had at the time of the purchase of his *warrantia chartæ;* and therefore it is good policy to bring his *warrantia chartæ* against him before he be sued, to bind the lands of the vouchee which he had at that time." Year Book 24 Edw. III. 35; Fitzh. Nat. Brev. 134. In the first sentence of this passage the defendant first referred to means the warrantor, that is, the defendant in the *warrantia chartæ*. Afterwards, it means the warrantee, the defendant in the action brought to recover the land. The judgment *pro loco et tempore* was at first, and until execution after *scire facias*, no more than a lien on the warrantor's land.

[1] The following case from 2 Hen. IV. pl. 14, shows that a mere warranty did not bind the other lands of the warrantor, but that a judgment *pro loco et tempore* did: "A question was moved between the Justices of the Common Bench, of what effect judgment *in warrantia chartæ pro loco et tempore* is, and it was moved that a warranty was no more than a covenant, and that by such covenant a man should not bind land to be bound in value afterwards in whosesoever hands they might come by purchase or otherwise, without judgment in any action, for this would be too great a mischief, . . . but otherwise it seems by the special judgment above." The case is not correctly copied into Brooke, Abridg. Warr. Ch. pl. 8, and the translation in Viner, Warr. Ch. M. pl. 3, follows the inaccuracy. "And hereby you may see, good reader," says Coke in 10 Rep. 41, as to Scholastica's case, "how dangerous it is to ground an opinion upon any abridgment, as in another place I have observed." As to the Year Books, it was said by the editor of the Leading Cases on Real Property: "In any other country but this, a series of Reports, spreading over nearly three centuries, from the beginning of the reign of Edward I. to nearly the end of the reign of Henry VIII., and of so great interest as illustrating the history of the law and of the country generally, would not have remained accessible only to a few, in black letter and Norman French." (Note to Taltarum's case.) Since then, seven volumes of the translated Year Books have been published in England, extending, however, as yet, only through the reign of Edward I., and the 11th, 12th, and 13th years of Edward III. The last of these volumes was published in 1885. While it is quite true that without the Year Books an approach to accuracy as to many doctrines is difficult, yet the manner in which the cases are reported leaves much to be desired; see Hare on Contracts, 137, 138. Something of this will be found *infra*, Ch. X.

[2] Viner, Warr. Ch. M. 4; Roll *v.* Osborn, Hobart, 25.

[3] Per Markham, C. J., in Year Book 8 Edw. IV. 11. "If I recover from my warrantor a judgment *pro loco et tempore*, and then am impleaded in an action in which I cannot vouch, as, for example, an assize or *scire facias*, it is proper for me to request him from whom I have thus recovered to put in a plea for me, and thus give him notice of the action that is pending, as otherwise I shall not be allowed to have execution on my judgment."

Beyond this merest outline of the process and pleadings applicable to warranty it is not necessary to go, nor to notice particularly the train of writs and returns, of false vouchers and foreign vouchers, essoins and casting essoins, the *magnum cape ad valentiam*, the *parvum cape ad valentiam*, the defaults and continuances, which clustered round these remedies.[1] Nor would they have been here referred to, save that, as will be hereafter seen, an analogy to some of them is not unfrequently, in some of our States, sought at the present day in actions on the covenants for title.

§ 12. There remains to be noticed the "recompense in value," as it was termed, for a loss of the land warranted. As to real actions in general, it is familiar that by the common law no damages were recoverable.[2] But as early as the statute of Merton,[3] Parliament began to allow damages in real actions, and this innovation was materially increased by the provision of the statutes of Marlbridge and of Gloucester.[4] Unless, however, in cases excepted by statute, the common-law rule remained.[5] But the remedy upon a warranty was not strictly a real action. It is spoken of as a mixed action wherein one recovered land and damages;[6] that is to say, land so far forth as the warrantor could render another feud of equal value, and damages whereby

[1] The learning as to this subject may be found in Viner, tit. Voucher & Warr. Char., and the notes to Careswell *v.* Vaughan, 2 Saunders, 32; Fitzh. Nat. Brev. 314; Roll *v.* Osborn, Hobart, 25; Booth on Real Actions, 242; and 1 Reeves's History, 422, 430; 2 id. 35. The form of a *cape* will be found in 6 Bracton (Twiss), 51. Booth, whose first edition was published in 1701, says: "This action (*warrantia chartæ*) is brought rarely, though sometimes at this day it may be, for I remember one about twenty-two years ago before the justices at Chester. I conceive it was about 15 or 16 Car. II. Another there is, the last session at Chester Assizes, April, 10 Will. III."

[2] Because, as has been said, "the court could not give the demandant that which he demanded not, and the demandant in real actions demanded no damages, neither by writ nor count." 2 Inst. 286. This reason is questioned in Booth on Real Actions, 75: "For in some mixed actions at common law, the demandant never counted to damages, as in assize, writs of entry in nature of assize, and in attaint, and yet damages were recoverable in those actions at common law."

[3] 20 Hen. III. c. 1, A. D. 1235.

[4] 52 Hen. III. c. 16, A. D. 1267, and 6 Edw. I. c. 1, A. D. 1278; and see the reading of Coke on these statutes in 2 Institutes.

[5] Until the somewhat recent act of 3 & 4 Will. IV. already referred to, which "at one blow swept away sixty-two real actions with barbarous names." Mayne on Damages, 2.

[6] Fitzh. Nat. Brev. 135, H. The ancient action of waste, and the action upon a warranty or other engagement binding land as against the heir, were the only actions properly designable as mixed.

to make up the deficiency.[1] The measure of value, however, was always that of the land at the time of the warranty made.[2]

The remedy upon warranty savored, however, so much of the realty that in the earlier days of its history it could be employed only when the estate which it accompanied was that of freehold, and only when the paramount claim was that of freehold. Yet as time wore on, the common law underwent some change as to this. In the reign of Henry the Sixth we find a case in which a warranty contained in a lease for years was allowed to be used as a covenant.[3] And in a remarkable case in the time of James the First, when the modern system of law was fully getting into use, we find that a warranty contained in a conveyance of a freehold was allowed to be used as a covenant, when the adverse claim was under a term for years.[4]

[1] Viner, Abr. Warr. Ch. M.

[2] See *infra*, Ch. IX., on the Measure of Damages.

[3] Year Book 32 Hen. VI. 32, pl. 27, A. D. 1453 (incorrectly copied in Brooke, Cov. pl. 38): "*Nota*, per Littleton, that if I lease land to another for a term of years by a deed indented, and I oust him, he shall have against me a writ of covenant; . . . but if he should be ousted by a stranger, he shall have a writ of *ejectione firmæ* against the stranger. . . . But if I am bound to warranty by the deed and the stranger ousts him by title, he shall have an action of covenant against me, or against my heir if he has [assets] by descent." But it was a covenant real, as distinguished from a mere personal covenant.

[4] Pincombe *v.* Rudge, A. D. 1609; Hobart, 3 *g*; Noy, 131; Yelverton, 139, affirmed in Exchequer Chamber, 1 Rolle, 25. The defendant had granted a freehold with warranty, having previously demised the premises for a term of years. The lessee entered upon the grantees, who brought an action of covenant on the warranty, and demanded damages from the warrantor, who pleaded a *warrantia chartæ* brought against him by them which was still undetermined. On demurrer to this plea, the question arose whether upon the clause of warranty annexed to a freehold an action of covenant would lie, which was decided affirmatively, because although the warranty was annexed to the freehold, yet the breach was not of a freehold, but of a chattel (viz. the lease for years, which had been the first estate created), for which there could be neither a voucher, rebutter, nor *warrantia chartæ*. See this case more particularly noticed, *infra*, Ch. VIII. This case must not be understood, as some have thought, as deciding that the remedy on a warranty was optionally covenant, but it decided that when warranty failed as a covenant real, the courts would mould it into a covenant personal. In other cases, if used at all, the use was the ancient one. Judge Holmes correctly says: "Glanvill's predecessors probably regarded warranty as an obligation incident to a conveyance, rather than as a contract. But when it became usual to insert the undertaking to warrant in a deed or charter of feoffment, it lost something of its former isolation as a duty standing by itself, and admitted of being generalized. It was a promise by deed, and a promise by deed was a covenant. This was a covenant having peculiar consequences attached to it, no doubt. It differed also in the scope of its obligation from some other covenants, as will be shown hereafter. But still it was a covenant, and could sometimes be sued on as such," referring to Pincombe *v.* Rudge. Holmes, "The Common Law," 377.

§ 13. Such is an outline of the law of warranty before it was superseded by the covenants for title. When exactly, and how, these covenants first crept into use cannot now be precisely determined. But it may not be impossible at least to conjecture their origin. So long as livery of seisin was necessary to the validity of the transfer of land, so long did warranty, which was essentially a covenant real, accompany the deed of feoffment. A personal covenant would have been an inappropriate element of such a form of conveyance. But the passage of the statute of Uses, towards the latter part of the reign of Henry the Eighth, introduced the conveyances familiar at the present day, which, taking their effect under that statute, passed the freehold without livery of seisin, and in a deed of bargain and sale or lease and release, a warranty, in its proper sense, would have been just as inappropriate as would have been a personal covenant in a deed of feoffment, while the covenant was eminently fitting. And hence it may be that we find, all through the reports of the time of Elizabeth, cases in which some of the covenants for title — generally, a covenant for seisin or of good right to convey — are used in conveyances taking effect by virtue of the statute of Uses. They are, however, generally couched in the briefest terms, and unaccompanied by other covenants. And by common consent it is considered that it was not until the time of the restoration of Charles the Second that the modern covenants for title were, in their present form, introduced into general practice, "being advised," we are told, by "the father of modern conveyancing,"[1] Sir Orlando Bridgman, "during the time of his practice, when the unhappy circumstances in which the kingdom stood afforded no other means of safety to persons of his loyalty and constancy than a strict retirement from public affairs."[2]

[1] Preface to Bridgman's Precedents of Conveyancing.

[2] See an interesting article by Mr. Joshua Williams, "On the Origin of the Present Mode of Family Settlements of Landed Property," in 1 Juridical Society Papers, 53, where he says that it was Bridgman who also introduced the practice of limitations to trustees to preserve contingent remainders, which was done to provide against forfeitures in the time of Cromwell, and to guard against the effect of the decisions, in the previous century, of Chudleigh's case and Archer's case, 1 Coke, 66 *b*, 120. It is rather singular that Lord Campbell says nothing of Bridgman's labors in this field; we hear only that he was eminent as a common-law judge, though narrow-minded, and that according to the judgment of some of his contemporaries he made a bad chancellor. 3 Campbell's Lives of the Chancellors, 234. See, however, the Preface to Bridgman's Judgments, and Foss's Judges of England,

These covenants were five in number: first, that the grantor was seised of the estate which he purported to convey, called the covenant for seisin; secondly, that he had a good right to convey it; thirdly, that the grantor should quietly possess and enjoy the premises without interruption, called the covenant for quiet enjoyment; fourthly, that such should be the case free and clear from all incumbrances, called the covenant against incumbrances; and fifthly, that such other assurances should be thereafter executed as might be necessary to perfect or confirm the title, called the covenant for further assurance. There is no evidence that the covenant in such general use in this country, called "the covenant of warranty," ever had a place in English conveyancing.[1]

If the form in which these covenants for title was originally expressed was short and simple, they soon lost this virtue; and as remuneration to the draftsman came to depend upon the length of the instrument, these afforded ample scope for redundancy of words, and for nearly two hundred years "the luxuriant growth to which their verbiage had attained" was the subject of great and just complaint;[2] but recently reform has reached the covenants for title, and in the most modern conveyances and books of precedents they are expressed with reasonable brevity. In the

123, &c. The subject of the introduction of the covenants by Bridgman is noticed in Doe *v.* Dowdall, 3 Houst. (Del.) 376, where it is suggested that they were unknown to Coke, who died in 1634, while Bridgman came to the bar in 1632: "So that it is quite clear that covenants for title, invented at a time of insecurity and revolutionary change, came into general use in the mother country in the latter half of the seventeenth century."

But while it is quite true that Bridgman first introduced these covenants in elaborate form, it is far from being so that they were unknown to Coke, for they were in frequent use both during and before his time, though in somewhat simple and concise form, and will be found in the reports, from those of Dyer, which commence at 4 Hen. VIII. (A. D. 1512), down. Thus, in Gray *v.* Briscoe, Noy, 142, and Muscot *v.* Ballet, Cro. Jac. 369, the action was on the covenant for seisin; in Bradshaw's case, 9 Coke, 60 *b*, (a leading one,) on the covenant of right to convey; in Briscoe *v.* King, Cro. Jac. 281, on the covenant against incumbrances and for further assurance; in Boulney *v.* Curteys, id. 251, on the covenant for further assurance; in Grenelefe *v.* W——, Dyer, 42 *a*, on the covenant for quiet enjoyment in the conveyance of a freehold; in Woodruff *v.* Greenwood, Cro. Eliz. 518, Corus *v.* ——, id. 544, Noke *v.* Awder, id. 373, 436, Penning *v.* Plat, Cro. Jac. 383, and Mountford and Catesby's case, Dyer, 328, on the covenant for quiet enjoyment in a lease. And with all of these cases Coke was of course familiar; Bradshaw's case he reported himself, and Noke *v.* Awder was the one in which, argued by him when Attorney-General, his professional triumph upon a question of pleading disturbed the courts of last resort upon both sides of the Atlantic for more than a century. See *infra*, Ch. X.

[1] See *infra*, Ch. VIII.

[2] Williams on Real Property (12th ed.), p. 447.

present reign, two attempts have been made by statute to give to short forms all the effect of the covenants as usually expressed at length; the first was unsuccessful;[1] the second, though the statute is of very recent date,[2] seems to have met with favor.

§ 14. The principal emigration to the American colonies took place during the latter half of the seventeenth century, and the settlers brought from their mother country so much of its laws and the mode of their administration as was deemed suitable to their new home. The more careful the study, not only of the early colonial conveyances, the opinions of counsel, their common-place-books, etc., but also and especially of the colonial legislation, the more satisfactory is the proof that those of the settlers who were lawyers added to great knowledge of their profession a comprehensive view of jurisprudence as a science. The skill with which so much of the common law — the growth of centuries — as was adapted to new institutions was retained or modified was not more remarkable than some of the improvements of that law introduced by legislation, which was, as to some of these, a century and a half in advance of the mother country. Unfortunately, history has left little record of the early colonial lawyers, but the work they did tells its own story.[3]

[1] 8 & 9 Vict. c. 119, one of the statutes known as "Lord Brougham's acts."

[2] Act of 44 & 45 Vict. c. 41, the "Conveyancing and Law of Property Act," 1881; see *infra*, Ch. II.

[3] The subject here incidentally referred to is one of important interest. As to part of it, it is of almost equal obscurity, owing to the present comparative lack of material for its illustration. Were such accessible, — for much of it must be in existence, — nothing would be more broadly useful than to contrast the growth of jurisprudence, not only between the mother country and her colonies, but between the colonies themselves. It would then be seen how in some cases one colony followed another in its alterations of the law which each had brought over, and how in others it was changed in one to suit its needs, all unconscious of similar changes in another. Unhappily, this must largely be the History of the Future, for the materials have as yet been sparingly published; for while in England it was not till almost within this generation that valuable parts of its legal literature have been produced in intelligible form and language, so but few of our States have seen fit to publish completely their early colonial statutes and records. The work has been partially done in Pennsylvania, and more thoroughly in Massachusetts. By those we have, we see how from the first our colonists introduced changes and reforms long in advance of the mother country. Among these are found the registration of deeds and mortgages (to this day practically unknown in England), the foreclosure of mortgages, the passing the estate of a married woman by acknowledgment instead of by fine, the barring of entails, the doctrine of set-off (the first statute in the English language as to it being enacted in one of the colonies), the enlargement of the remedy by replevin, the administration of the estates of decedents and making their land assets for the payment of their debts, — these and many other subjects were treated with a breadth

Even if at this time warranty had not been superseded in England, its application would have been found impossible in a country in which primogeniture was not a part of the law of descent. For warranty descended only upon the heir at common law, — it operated as a rebutter on him alone, — it bound him alone to render other lands of equal value. In those parts of England where the peculiar tenures of gavelkind and borough-English prevailed, the hardship was extreme. The heir at common law was still vouched to warranty, though the inheritance was in the one case divided among his brothers, and in the other enjoyed exclusively by the youngest of them.[1]

§ 15. In the earliest conveyances which remain of record in our colonial times are to be found some or all of the covenants for title, more or less simply or elaborately set forth, together with, in general, a clause of warranty, literally translated — sometimes with and sometimes without the addition of words of covenant — from the warranty in use during feudal tenure. In this form it has been preserved to the present day, and although there is no link between the warranty of feudal times and the American covenant of warranty, yet in many of the United States the latter has at times been clad with the mantle of the former, and considered to possess a certain potency denied to the other covenants for title, and which, indeed, did not belong to the ancient warranty itself.[2]

and practical knowledge unknown or ignored in the mother country for generations later. Nor only this. These remedial statutes, which, under the terms of the charters, were obliged to be sent within a certain number of years to England for approval, were constantly repealed in the Privy Council without regard to the needs which produced them or the dissimilarity between the countries; and this was so persistent that soon the colonists were driven to retain here their laws as long as they could, and when repealed in Council would pass others more or less exactly like them, would again retain these, which being repealed were again enacted here; and thus commenced the train of grievances which finally cost the crown its colonies.

[1] Brooke's Abr. tit. Garranties, pl. 11; Assize, pl. 22; Litt. §§ 735, 736; Robinson on Gavelkind, 127.

[2] Namely, its effect by way of estoppel or rebutter; *infra*, Ch. XI.

CHAPTER II.

THE "USUAL COVENANTS," AND WHAT COVENANTS THE PURCHASER HAS A RIGHT TO EXPECT.

§ 16. The disparity in number between the English and the American cases on the subject of covenants for title — the latter being so much more numerous than the former — is as obvious as is the reason for it. In the earlier days of warranty, and for centuries after, such a thing as an examination of the title was unknown, and the vassal relied on the warranty of his lord for his protection. Hence the Year Books and the early treatises swarm with the law of warranty; and when the illegitimate doctrine (for so it may fairly be termed) of collateral warranty was introduced, the cases increased in number and intricacy.[1] But toward the close of the seventeenth century, with the comparative cessation of civil warfare and the steady improvement and increase in value of real estate, the law of vendor and purchaser began to take substantial form; and as land became more the subject of transfer, its muniments of title were more readily yielded to the examination of the purchaser, and the latter came to depend rather upon that examination of the title than upon the covenants which were to assure it. This, of course, lessened their practical use for the purpose for which the old warranty was at first employed, viz. as a means of redress against loss of the land; and as for its later use, the covenants for title were never suffered in England, as has been to some extent the case in America, to be applied to the purposes for which collateral warranty was used.[2] Hence, the more careful the examination of the title, the less the use of the covenants, until, as was said by an eminent writer, "Purchasers, in general, attach more value to covenants for title than they deserve;"[3] and hence, of course, the small number of cases to be found in the English reports.[4]

[1] See *supra*, § 7 *et seq.*

[2] That is to say, by way of estoppel; see *infra*, Ch. XI.

[3] Preston on Abstracts of Title, 57.

[4] As an illustration of this, it is seldom, on either side of the Atlantic, that a

§ 17. On this side of the Atlantic it is different. Apart from obvious reasons springing from the settlement of a new country, the English system of conveyancing in its present advanced state is by no means generally adopted;[1] land changes hands more freely and with less examination of the title, and sometimes, as for example when taken in payment of a debt, with no examination at all; and then, to some extent, an effect has here been given to the covenants, or some of them, in their operation by way of estoppel which is altogether denied to them in England.[2] From all these causes, the American reports are proportionally as full of cases upon the subject of covenants for title as the Year Books were with cases upon the subject of warranty.

§ 18. But even in England, however rigid the examination of the title and however willing courts might be to carry out the doctrine which, while the contract is executory, protects the purchaser's right to a title clear of defects and incumbrances, yet while so doing they have also continued to recognize and enforce his right to covenants for the title.[3] As to this, therefore, — the

tenant, in the case of what are called "common leases" (i. e. where the term is a short one), examines his landlord's title; and for many years past, and at this day, of the small number of cases on covenants for title to be found in the English reports, by far the greater number — indeed nearly all — are cases on covenants contained in leases.

[1] Thus even in large cities, where property is more valuable and the examination of titles a matter of course, it is rare to find in an abstract of title those accompanying affidavits to substantiate ordinary recitals of pedigree, &c., which in England are almost universal. See Moore on Abstracts of Title, 105, *n.*; Lee on Abstracts, 215; 2 Preston on Abstracts, 455; 3 id. 279; Dart on Vendors (5th ed.), 346. Sugden says, speaking as a matter of course, "So, certificates of marriages, births, and baptisms should be required to verify a pedigree, and certificates of burial to prove the death of parties, and the last receipt or other sufficient evidence of the payment of an annuity or jointure which has recently ceased by the death of the party entitled." Sugd. on Vend. (14th ed.), 415. But on this side of the Atlantic, statements of pedigree are only found by way of recital in the deed and are usually unaccompanied by affidavit. Warvelle on Abstracts of Title (Chicago, 1883), p. 313, also p. 33, where the danger of taking title from alleged heirs is well stated. To this treatise, the first of its kind in America, the student may profitably refer as showing the striking differences between the system of conveyancing on the different sides of the Atlantic. In its Preface, the author correctly says, "Several works [on Abstracts of Title] of more than ordinary merit have appeared in England, in which the subject, from an English standpoint, is very thoroughly and ably discussed, but the irreconcilable differences in our laws and institutions have rendered them comparatively worthless to the American practitioner, and they are rarely met with on this side of the water. The methods of English conveyancers and solicitors, while admirably adapted to the exigencies of their own laws and customs and highly conducive to the end desired, are but ill suited to our wants, and furnish little assistance in tracing the devious courses of an American title."

[2] See *infra*, Ch. XI.

[3] "If," said Lord Eldon in Church *v.* Brown, 15 Ves. 263, "a man covenants

general and abstract right of the purchaser to receive covenants for title from his vendor,[1] — there is no difference in the law of the two countries.

§ 19. It is proposed, then, to consider, first, what are the usual covenants on both sides of the Atlantic, and secondly, the extent of those covenants relatively to the different classes of vendors.

And first, what are "the usual covenants"?

The very use of the word "usual" excludes, of course, that which is universal, and it is only possible, therefore, to give a general idea of what is customary as to this.

§ 20. In England the modes of assurance in which covenants for title are contained are, for the most part, —

1. *Sales, in the popular sense, that is, sales of an estate in fee simple;*
2. *Settlements;*
3. *Mortgages;*
4. *Assignments or transfers of leasehold interests;*
5. *Common leases.*

to sell a fee-simple estate, free from all incumbrances, and says no more, it is clear that covenant carries *in gremio*, and in the bosom of it, the right to proper covenants. Why? Because that sort of engagement has in all times been carried into execution in a form and mode which alter most materially, substantially, and importantly, the effect of the mere conveyance." Davidson observes, "Although it seems to have been formerly held that the right to covenants for title was not implied by the mere agreement to sell, yet the contrary is now established by the practice of conveyancers and the authority of the courts." 1 Dav. Conv. (3d ed.) 113. So on this side of the Atlantic, Story J., in Clarke *v.* Courtney, 5 Pet. (S. C. U. S.) 319, spoke of "the common course of conveyances in which covenants for title are usually inserted," and this was indorsed in Le Roy *v.* Beard, 8 How. (S. C. U. S.) 467, the court saying, "The usages of this country are believed to be very uniform to insert covenants in deeds. . . . If in this power of attorney no expression had been employed beyond giving an authority to sell and convey this land, saying nothing more extensive or more restrictive, there are cases which strongly sustain the doctrine that, from usage as well as otherwise, a warranty by the agent was proper, and would be binding on the principal." And the contract will not be satisfied by covenants from a third party; they must be those of the vendor himself. Bigler *v.* Morgan, 77 N. Y. 312; Rudd *v.* Savelli, 44 Ark. 152.

[1] "The covenants for title," says Dart, "are that part of the draft upon which disputes and questions of difficulty most frequently arise; they are of considerable, although perhaps, to a purchaser, of rather over-estimated importance; to the solicitor they are important, inasmuch as he will be responsible to his client for permitting him unknowingly to enter into improper covenants, or for not securing to him those to which he is entitled from the other party." Dart on Vend. (5th ed.) 543, citing Stannard *v.* Ullithorne, 10 Bing. 491, where the attorney was held liable, although the vendor was at the time aware of the fact in respect of which the liability on the covenant was incurred. The recent "Conveyancing and Law of Property Act, 1881," 44 & 45 Vict. c. 41, § 66, Law Rep. xvii. Stat. 110, protects solicitors employing the forms therein provided.

And the covenants are different in each of these classes.

1. *As to sales of an estate in fee simple.* — To a layman it would seem plain that if one were to undertake to convey an estate in fee simple which he professed to hold in his own right and not fiduciarily, he must himself be seised of such an estate; and yet until somewhat lately it was common conveyancing in England, for the purpose of saving the expense upon a resale of levying a fine whereby to bar the dower of the wife, to cause property, upon its purchase, to be conveyed to such uses as the purchaser should appoint, and in default of appointment to the use of the purchaser and his heirs.[1] And it is perhaps owing to this custom that the covenant for seisin has been, for nearly a century, generally omitted in England, and the covenant for good right to convey has been substituted. And although by an act of Parliament in the last reign [2] the estate of the wife is now passed, as with us, by a simple separate acknowledgment, yet it is usual, in modern conveyancing, to omit the covenant for seisin.[3]

The usual covenants then in England, in the case of a sale, are those of good right to convey, for quiet enjoyment, against incumbrances, and for further assurance; and they have been generally expressed as follows.[4]

[1] Here, of course, upon a resale, the vendor conveyed in execution of the power, which overrode the estate of the wife, while if he died without having sold, the use became executed and the wife's dower attached. And although it was once held (Goodill *v.* Brigham, 1 Bos. & Pull. 192) that a power was inconsistent with an estate in fee simple, the latter being of so high a nature as to merge and render void any power which might be intended to accompany it, and this was adopted by Sir William Grant, M. R., in Maundrell *v.* Maundrell, yet the contrary has long been the law; s. c. 10 Ves. 264, per Lord Eldon.

[2] 3 & 4 Will. IV. c. 74. Partly repealed and supplied by the "Conveyancing Act, 1882," 45 & 46 Vict. c. 39, Law Rep. xviii. Stat. 138.

[3] When used, however, the covenant for seisin is said to be thus expressed: "And the said (grantor) doth hereby for himself his heirs executors and administrators covenant with the said (grantee) and his heirs and assigns that he the said (grantor) is now seised to him and his heirs of a good sure sole lawful absolute and indefeasible estate of inheritance in fee simple of and in the said messuage &c. hereby released or otherwise assured or intended so to be and every part and parcel of the same with the appurtenances without any condition trust power of revocation or of limitation to use or uses or any other power restraint cause matter or thing whatsoever to alter change charge defeat revoke make void abridge lessen incumber or determine the same estate or any part or parcel thereof." Platt on Covenants, 306. This form is somewhat long, but so are all those given by Platt. In the more modern books no form of this covenant is given.

[4] In well-ordered conveyancing, the covenants for title are inserted at the end of the deed, immediately before the attestation clause.

"And the said (vendor) doth hereby for himself his heirs executors and administrators covenant with the said (purchaser) his heirs and assigns that [notwithstanding anything by him the said (vendor) or any of his ancestors or testators done omitted or knowingly suffered [1]] he the said (vendor) now hath power to grant all the said premises hereinbefore expressed to be hereby granted to the uses hereinbefore declared And that the said premises shall at all times remain and be to the use of the said (purchaser) his heirs and assigns and be quietly entered into and upon and held and enjoyed and the rents and profits thereof received by the said (purchaser) his heirs and assigns accordingly without any interruption or disturbance by him the said (vendor) or any person or persons whomsoever [claiming through or in trust for him (or any of his ancestors or testators) [2]] And that free and discharged from or otherwise by him the said (vendor) his heirs executors or administrators sufficiently indemnified against all estates incumbrances claims and demands [created occasioned or made by him the said (vendor) or any of his ancestors or testators or any person claiming through or in trust for him them or any of them] And further that he the said (vendor) and any persons having or claiming any estate right title or interest in or to the said premises or any of them through or in trust for him or any of his ancestors or testators will at all times at the cost of the said (purchaser) his heirs or assigns execute and do every such assurance and thing for the further or more perfectly assuring all or any of the said premises to the use of the said (purchaser) his heirs and assigns as by the said (purchaser) his heirs or assigns shall be reasonably required." [3]

[1] The words within brackets [ ] in the preceding and succeeding forms are those limiting the covenants to the acts of the vendor, &c., a subject which will be presently considered.

[2] It has been customary to add here the words, "or by or with his or their acts means consent default privity or procurement." For the construction given to these words see *infra*, Ch. VI.

[3] This and most of the English forms here given are taken from Davidson's Precedents and Forms of Conveyancing, an approved modern standard work. Reference may also be had to Bythewood & Jarman's Conveyancing by Sweet; 2 Hughes's Practice of Sales of Real Property, 9, Appendix; Houseman's Handbook of Precedents in Conveyancing; Clayton's Elements of Conveyancing, and the forms in the statute of 44 & 45 Vict. c. 41. See *infra*, p. 27, note 3. In the last-named treatise, the following very concise form of all the covenants is given: "And the said (grantor) for himself and his heirs but for and against the acts and defaults only of himself and his ancestors and all persons claiming or to claim through under or in trust for him them or any of them covenants with the said (purchaser) his heirs and assigns that he the said (grantor) hath power hereby to convey the said purchased premises in manner aforesaid free from incumbrances and that the said premises shall henceforth be held and enjoyed accordingly and shall at any time or times at the costs of the person or persons requiring the same be further and more

2. *Settlements*, such as marriage and family settlements, "sometimes contain covenants for title similar to those contained in conveyances on sales," [1] though the propriety of the practice seems lately to have been doubted,[2] and it has been

effectually or satisfactorily assured to the use of the said (purchaser) his heirs and assigns in manner aforesaid or otherwise as he or they shall direct by such acts deeds or other assurances as he or they shall reasonably require and tender to be executed," p. 206. In conveyances, as in statutes, there should be no punctuation, "for no one would wish the title to his estates to depend on the insertion of a comma or semicolon." Williams on Real Property (12th ed.), 196.

[1] Hood & Challis, Conveyancing Acts, 128. "A settlement of real estate generally terminates with covenants for title by the settler as upon a sale. Such covenants are inserted not only on account of the consideration for the settlement when made upon marriage or for other valuable consideration, but also in order that persons taking under the powers of sale and exchange and other like powers (who will get from the trustees only a covenant against their own incumbrances) may have the benefit of the ordinary covenants for title;" (3 Dav. Con., 2d ed., 523;) or, as the reason is elsewhere stated by the same author, "The husband or other grantor of the estate enters into the usual covenants for title as upon a sale, both because a settlement for valuable consideration, as a marriage settlement, is on the footing of an assurance to a purchaser, and in order that a vendee buying from the trustees may have the benefit of a proper chain of covenants up to the conveyance to them." Id. 45; see also 1 Dav. Con. (3d ed.) 115; 3 id. (2d ed.) 214, 704, 774, 779, 905; 7 Blyth. Con., 447, 495, 504; 2 Prideaux (10th ed.), 237, 262; Williams on Settlements, 126.

In Wolstenholme & Turner's recent work on the "Conveyancing and Law of Property Act, 1881," (as to which see *infra*, p. 27, note 3,) they say (p. 40): "The old practice in settlements was for the settlor to give the ordinary vendors covenants for title. This can still be done by making him convey as beneficial owner instead of a settlor, and so incorporating covenant A [being one of the covenants implied by the statute]. The old practice is inconvenient. If a charge be suppressed or accidentally overlooked, the trustees on discovering it become bound to sue the settlor. The amount to be recovered might be such as to leave him penniless and make proceedings in bankruptcy necessary. This cannot be for the benefit of the wife or family, and is an obligation which should not be imposed on trustees. There should be either no covenant for title, or at most this limited covenant E, which binds the settlor to bar an estate tail (see Davis *v.* Tollemache, 2 Jur. N. S. 1181, 1185), or execute a valid appointment under a power, or do any other like act for confirming the settlement, but does not throw on him any obligation to discharge incumbrances."

[2] In Monypenny *v.* Monypenny, 9 H. L. C. 114, 133, a case decided upon its peculiar facts, Lord St. Leonards, dissenting, said: "When a man marries and puts his estate in settlement, he is never made to do more than covenant against his own acts and the acts of those claiming under him. If his title should prove infirm, it would be a family misfortune; but if he had warranted his title absolutely, he would be called upon to pay the value of his estates at the very moment that the means of payment, the estates themselves, were taken from him. The practice thus to limit liability would, of course, apply still more forcibly in the case of a relative of the husband's bringing his estate into settlement." This *dictum* was cited by Chatterton, V. C., in Thompson *v.* Thompson, 6 Irish Eq. 113, 118. In both cases, the practice of conveyancers was invoked to aid merely in interpreting settlements of doubtful import, and neither the insertion nor the omission of vendor's covenants can properly be said to have received

said that "voluntary settlements seldom contain any beyond (at most) a covenant for further assurance."[1]

3. *In cases of mortgages*, it is usual in England to insert the covenants for title used in sales, except that the covenants are not restricted to the acts of the mortgagor but are against the acts of all claiming by title.

4. *In the assignment or transfer of a leasehold interest*, the usual covenants are that the lease is a valid and subsisting one, that its covenants have been hitherto performed by the assignor (though this is not strictly a covenant for title), and for quiet enjoyment.[2]

5. In *common leases*, as they are called, that is, where the term is a short one, the usual covenant, and the only one generally employed, is that for quiet enjoyment, and as the title is in general not examined by the tenant, the covenant is not limited to the acts of the lessor.[3]

judicial approval. The subject is also noticed in an article in 72 Law Times, 382, 434.

By the Roman law, warranty or indemnity against eviction did not accompany donations. Maynz, Droit Romain (4th ed.), t. ii. § 212, p. 223.

[1] Hood & Challis, *supra*. In addition to what is so forcibly stated by Lord St. Leonards as to vendors' covenants in settlements, it may be added that the trustees under them incur liability for their neglect to enforce them. Macnamara *v.* Macnamara, 1 Irish Eq. 9. It has been suggested that "this can be avoided by the insertion of a clause to the effect that they shall not be liable for neglecting to enforce the covenant." 72 Law Times (1882), 382.

[2] They were generally thus expressed: "Doth hereby covenant with the said (purchaser) his executors administrators and assigns that [notwithstanding anything by him the said (vendor) done omitted or knowingly suffered] the hereinbefore recited indenture of lease of the day of is now a valid and subsisting lease of the said premises hereinbefore expressed to be hereby assigned and is in no wise void or voidable And that [notwithstanding any such thing as aforesaid] all the rents covenants and conditions in and by the said indenture of lease reserved and contained and on the part of the lessee his executors administrators and assigns to be paid performed and observed have been paid performed and observed up to the date of these presents And that [notwithstanding any such thing as aforesaid] he the said (vendor) now hath power to assign all the said premises hereinbefore expressed to be hereby assigned unto the said (purchaser) his executors administrators and assigns for the term for which the same are hereinbefore expressed to be hereby assigned And that it shall be lawful for the said (purchaser) his executors administrators and assigns at all times during the said term quietly to enter into and upon and hold and enjoy the said premises." 2 Dav. Con. (2d ed.) 192. "The most common case in which covenants for title in leases are practically useful is in leases by limited owners in excess of their powers. In such cases it may happen that the persons entitled to evict the lessee are also liable under the covenants for title." Hood & Challis, Conveyancing Acts, p. 125.

[3] See *infra*, § 26. And the form of the covenant generally is, "that he the said (lessee) paying the said rent hereby reserved shall at all times quietly enjoy,"

Such, then, was until very lately the form in which the "usual covenants" were expressed.

It were needless to refer particularly to the English statute of 8 & 9 Vict. c. 119,[1] which, passed in 1845, sought to replace by "implied pattern covenants" those express ones which had been in use for two centuries. It suffices to say that the act was a dead letter, and was soon by common consent said to be "by the universal consent of the profession consigned to a deserved oblivion."[2] Nearly forty years later was passed another statute, the "Conveyancing and Law of Property Act, 1881," which, broader in scope and more carefully drawn,[3] is said to have

&c. ; but it has been held that this does not amount to a condition precedent, and that the covenantor will be held liable on the covenant, even although the rent should be in arrear. Hayes *v.* Bickerstaff, 2 Modern, 35 ; Dawson *v.* Dyer, 5 Barn. & Adolph. 584 ; Bartlett *v.* Greenleaf, 11 Gray, (Mass.) 98.

[1] More particularly referred to *infra*, Ch. XII.

[2] Dart on Vend. (5th ed.) 504.

[3] 44 & 45 Vict., c. 41, Law Rep. xvii. Stat. 110 (supplemented by the Conveyancing Act, 1882, 45 & 46 Vict., c. 39, Law Rep. xviii. Stat. 138), the two being generally cited together as "The Conveyancing Acts, 1881–82," sometimes called Lord Cairns's Act. It was, however, drafted by Mr. Wolstenholme, one of the conveyancing counsel to the Chancery Division of the High Court, and one of the authors of Wolstenholme & Turner on Conveyancing Act of 1882. It is, however, curious to see how settled conservatism sets itself even against successful reform. The Act of 44 & 45 Vict. was not so vastly superior to that of 8 & 9 Vict. as that the latter should have failed and the former succeeded, simply upon their respective merits, but during the thirty-six years which elapsed between their passage, the alteration in the English system, by the Judicature Act and otherwise, had been enormous. Of the 8 & 9 Vict., Dart, speaking of the implied covenants thereby created, said : "Such enactments are either unnecessary or mischievous ; unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use ; and mischievous, if an unnatural and secondary meaning is given by statute to words which are *prima facie* clear and intelligible ; for the effect is to increase the difficulty of legal documents to the unprofessional reader." But the same criticism would obviously apply to the 44 & 45 Vict., and an approved author in speaking of this statute, although he admits that "these implied covenants are now very commonly adopted in practice," yet adds, "perhaps, in reliance upon the improbability that in any given case they will come to be practically tested. It would be imprudent to rely upon them in any case where it is foreseen that the covenants for title may need to be enforced, because their exact scope would, in any given case, be more difficult to ascertain than that of the express covenants formerly in use." Hood & Challis, Conveyancing and Law of Property Act, 1881. Indeed, a series of otherwise able articles in the London Law Times of 1872 and 1873 prophesies immediate and deserved failure to these statutes, and yet it is known practically that "the recent legislation has produced a revolution in the practice of English conveyancers. The old cumbrous forms of precedents have been swept away, and modern conveyances are short, intelligible documents, stripped of much of the old black-letter learning which had come to be regarded only as legal lore and jargon, and altogether in discord with the requirements and necessities of the last quarter of the nineteenth century." In a subsequent

produced a revolution in English conveyancing. Not only does it provide among other things that in assurances drawn in accordance with it the benefit and the burden of covenants relating to land shall respectively enure to and bind assigns and heirs although not named therein, but that there shall be implied in such conveyances a covenant to the effect therein stated by the person conveying with the person to whom the conveyance is made, viz. covenants for the title, that is, in conveyances for value by the beneficial owner,[1] covenants (limited, not general) for right to convey, quiet enjoyment, freedom from incumbrances, and further assurance; on conveyance of leasehold for value other than a mortgage by the beneficial owner, a covenant (limited) for the validity of the lease; on conveyances in mortgage by the beneficial owner either of freehold or leasehold property the same covenants for the title, but general or unlimited; in a conveyance by way of settlement, a covenant by the person so conveying and all deriving title under him, for further assurance, and on conveyance by a trustee or mortgagee, a covenant that he has done no act to incumber. There is also a provision, most important in England, where there is practically no general system of registration, but equally unimportant here where such a system is universal, for an acknowledgment of right of production and undertaking for safe custody of documents, i. e. title deeds, etc. Statutory forms of conveyances, though much less elaborate, exist in many of the United States.[2]

§ 21. As to those upon this side of the Atlantic, of course the local habit and usage vary not only more or less widely among the different States, but sometimes indeed between different parts of the same State; but it may in general be said that what here are called "full covenants" are the covenants for seisin, for right to convey, against incumbrances, for quiet enjoyment, sometimes for further assurance, and almost always of warranty, this last often taking the place of the covenant for quiet enjoyment, and indeed in many States being the only covenant in practical use.[3]

chapter (Ch. XII.) it will be seen that statutory covenants have been introduced in many of the United States.

[1] The expression "beneficial owner" refers to the one who really owns the property. It was not unusual that the legal title was in a trustee. *Supra*, p. 23.

[2] *Infra*, Ch. XII.

[3] The following form of these covenants is perhaps more generally used than most

§ 22. There is another covenant sometimes employed, particularly it would seem in the New England States, called the covenant of non-claim.[1]

others : "Doth hereby covenant for himself his heirs executors and administrators that [notwithstanding any act matter or thing by him done] he the said (vendor) is now lawfully seised of the said premises And hath good right to convey the same That the same are free from all incumbrances [done suffered or committed by him] And that the said (purchaser) his heirs and assigns shall and may at all times hereafter freely peaceably and quietly enjoy the same without molestation or eviction of him the said (vendor) or any person or persons whomsoever [lawfully claiming or to claim the same by from or under him them or any of them] And that he the said (vendor) shall at all times hereafter at the request and expense of the said (purchaser) his heirs and assigns make and execute such other assurances for the more effectual conveyance of the said premises as shall be by him reasonably required And that he the said (vendor) and his heirs all and singular the messuages and tenements &c. hereby granted and mentioned or intended so to be with the appurtenances unto the said (purchaser) his heirs and assigns against him the said (vendor) and his heirs and against all and every other person or persons lawfully claiming or to claim the same or any part thereof [by from or under him them or any of them] shall and will by these presents warrant and forever defend."

The following form was, by a text-writer of authority, said to be in common use in New England : "I (A. B.) for myself my heirs executors and administrators do covenant with (C. D.) his heirs and assigns that I am lawfully seised in fee simple of the aforegranted premises that they are free from all incumbrances that I have a good right to sell and convey the same to the said (C. D.) his heirs and assigns forever as aforesaid and that I will and my heirs executors and administrators shall warrant and defend the same to the said (C. D.) his heirs and assigns forever against the lawful claims and demands of all persons." 3 Washburn on Real Property (3d ed.), 610, *n.* This seems to be omitted in the fourth edition (1887). On the other hand, in Greene *v.* Creighton, 7 R. I. 1, the covenant sued on — that against incumbrances — was expressed nearly as fully as in the older English form ; and the deed (made in 1854) was said to contain "full covenants of warranty according to the form used in this State."

In those States in which the covenants for title, or some of them, are by statute implied from the words of grant of the conveyance, at least so as to assure the estate to the purchaser as far as the acts of the vendor are concerned (as to which see Chapter XII.), the covenant for seisin, being usually one of those thus implied, is often entirely omitted in express words, and the only covenant expressed is that of warranty.

[1] Its form is generally as follows : "So that neither the said (vendor) nor his heirs nor any other person or persons shall or will at any time hereafter have claim challenge or demand any estate right or title to the aforesaid premises or to any part or parcel thereof but of and from all such claims and demands shall be utterly debarred and forever excluded by virtue hereof."

This covenant is also used in Pennsylvania in deeds of extinguishment of ground rents.

The covenant for quiet enjoyment as generally expressed in ground-rent deeds in Pennsylvania is, "that the said (grantee) his heirs and assigns paying the said yearly rent and taxes or extinguishing the same by purchase and performing the covenants and agreements aforesaid shall and may at all times hereafter forever freely," &c.

It is obvious, however, that any apt words showing the intention of the parties will amount to such a covenant. Thus, "to hold free and clear from me my heirs &c. and from all other persons whatsoever" (Midgett *v.* Brooke, 12 Ire. N. C. 147), and "to hold and enjoy the said premises peaceably and quietly for the said

As a general rule, there is no practical difference between this covenant and the covenant of warranty.[1]

§ 23. Statutory provisions for forms of conveyances are found in the States of Illinois, Indiana, Kentucky, Michigan, Mississippi, Tennessee, Texas, Virginia, West Virginia, and Wisconsin, and perhaps others. Of these, the statute of Indiana, which is the most concise — that in Michigan is the same — may serve as an example: —

"Any conveyance of lands worded in substance as follows — 'A. B. conveys and warrants to C. D. (here describe the premises), for the sum of (here insert the consideration),' the said conveyance being dated, and duly signed, sealed, and acknowledged by the grantor — shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor for himself and his heirs and personal representatives that he is lawfully seised of the premises, has good right to convey the same and guarantees the quiet possession thereof; that the same are free from incumbrances, and that he will warrant and defend the title to the same against all lawful claims."[2]

§ 24. These, then, are the "usual covenants" in use on both sides of the Atlantic, and we proceed to consider their extent relatively to the different classes of grantors.

These classes are three: —

I. Those who convey, by sale, mortgage, or otherwise, estates of which they are seised in their own right;

II. Fiduciary grantors, such as trustees, executors (whether conveying in exercise of a power or under authority of a decree), mortgagees with power of sale, assignees of bankrupts, insolvents, and the like;

III. Ministerial grantors, such as sheriffs, marshals, tax-collectors, &c.

term" (Levitzky *v.* Canning, 33 Cal. 299), were respectively held to be covenants for quiet enjoyment. So with respect to the covenant for further assurance, where a deed, in itself sufficient as a present conveyance, contained a clause in the habendum that the grantee should hold the premises to his heirs and assigns forever, and a covenant to make a good and sufficient deed with a warranty of title when required, this was held in Davis *v.* Tarwater, 15 Ark. 288, to be a present conveyance of the fee with a covenant for further assurance, and not a mere agreement to convey.

[1] The exception to this is noticed *infra*, Ch. XI.

[2] Rev. Stat. Ind., 1881, p. 582. And a deed in this "short form" is there obviously held to convey the land to the grantor and "his heirs and assigns" as fully as if these words and the full covenants were written out at length therein. Keiper *v.* Klein, 51 Ind. 316.

§ 25. First, those who convey estates held in their own right, and not fiduciarily.

When in England the examination of the title became a matter of course, and vendors who brought their estates into the market were forced to comply with certain rules which it was held the purchaser had a right to exact, it was naturally thought unreasonable that he should receive covenants against the acts of all persons, and the extent of the covenants which a purchaser had a right to expect soon became matter of regulation; and it is now well settled both in point of authority and practice, that a purchaser has no right to demand from his vendor covenants of greater scope than against his own acts.[1] Where the vendors

[1] "If a man purchase an estate of inheritance," said Lord Eldon, "and afterwards sell it, it is to be understood *prima facie* that he sells the estate as he receives it, and the purchaser takes the premises granted by him, with covenants against his acts. This seems at first to involve a degree of injustice, but it all depends on the fact whether the vendor be really putting the purchaser into the same situation in which he stood himself. If he has bought an estate in fee, and at the time of the resale has but an estate for life, it must have been reduced to that estate by his own act, and in that case the purchaser will be protected by the vendor's covenants against an act done by himself. But if the defect in his title depend upon the acts of those who had the estate before him, and he honestly but ignorantly proposed to another person to stand in his situation, neither hardship nor injustice can ensue. What is the common course of business in such case? An abstract is laid before the purchaser's counsel, and, though to a certain extent he relies on the vendor's covenants, still his chief attention is directed to ascertaining what is the estate, and how far it is supported by the title. The purchaser, therefore, not being misled by the vendor, makes up his mind whether he shall complete his bargain or not; and if any doubt arise on the title it rests with the vendor to determine whether he will satisfy these doubts by covenants more or less extensive. *Prima facie*, therefore, in the conveyance of an estate of inheritance, we are led to expect no other covenants than those which guard against the acts of the vendor and his heirs." Browning *v.* Wright, 2 Bos. & Pull. 23. For the connection in which these remarks were made, see *infra*, Ch. XII.

See, in accordance with this view, Church *v.* Brown, *supra*, and two opinions in 2 Powell's Conveyancing, 206–209. So it was said in Thackeray *v.* Wood, 6 Best & Smith, (Q. B.) 773: "The operation of a qualified covenant for title is well known, and has been established by a series of cases, and I do not feel justified in departing from the construction established by those decisions. Upon a sale of real property it is for the purchaser to determine what the title of the vendor is, and to satisfy himself that he has a good title. The vendor then makes a conveyance, and usually covenants that he has done no act to affect or derogate from his title. If the vendor had no title at all to the property conveyed, there would be no breach of such a covenant." "A vendor," says Mr. Fearne, "who purchased the estate himself should covenant only against his own acts and the acts of all claiming under him, where the title is well deduced and the identity of the lands conveyed to him and those sold by him is apparent; but if the title of the vendor is questionable he should covenant generally; and if the lands conveyed, owing to any alteration in them or otherwise, do not evidently appear by the description of them in the purchaser's deed of conveyance to be the

are tenants in common they covenant severally, and their covenants are restricted to their several undivided shares,[1] and though joint tenants sometimes covenant jointly, yet this is with reason deemed objectionable.[2]

As to covenants by married women, it is familiar that, as the common law sank the existence of the feme covert into that of her husband, her contracts were absolutely void.[3] But there has recently been introduced by legislation, first in the United States and subsequently in England, a statutory separate estate, and her liability as to her covenants for title in its conveyance depends on the provisions of the local statutes.[4]

§ 26. An exception to the rule that the covenants are usually limited is in the case of a mortgage, in which a mortgagor always gives unlimited covenants for the title, as those who lend money are accustomed to require every security for its repayment,[5] and to some extent such would also seem to be the prac-

same conveyed to the vendor, the vendor should further covenant that they are part of the estate conveyed to him by his vendor." Fearne's Posth. Works, 110, 118.

[1] 1 Dav. Con. (3d ed.) 114. So in Massachusetts, where the vendors, tenants in common, were "to give a good and sufficient warranty deed, they made and tendered," said the court, "a deed in which each grantor warranted his several share, but not that of his co-grantors. This is clearly right. The purchaser was to have a warranty of title from him who conveyed, but not also a guaranty from others. If several deeds had been made with several covenants, the terms would have been complied with. The legal effect is the same in a joint deed with several covenants." Coe *v.* Harahan, 8 Gray, 198.

[2] "Because their so doing makes all liable originally for the acts of each, and leaves the whole burden on the survivors for the time being, and ultimately on the longest liver." 1 Dav. Con. (3d ed.) 114.

[3] With the exception of feme sole traders, by virtue of the custom of London; Bohn's Priv. Lond. 187. See *infra*, Ch. XIII. Davidson's Conveyancing contains the following form of a covenant by a married woman in a conveyance executed by virtue of a power: "And the said (husband) doth hereby for himself his heirs executors and administrators and she the said (wife) in exercise of her aforesaid power and of every or any other power or authority enabling her in this behalf and to the intent to charge and bind her separate estate doth hereby for herself her heirs executors and administrators covenant with the said (purchaser) his heirs and assigns that notwithstanding anything by her the said (wife) done," &c. 2 Dav. Con. (3d ed.) 421.

[4] See as to this, *infra*, Ch. XIII.

[5] Williams on Real Property (12th ed.), 447; Cripps *v.* Reade, 6 Term, 606; Sugd. on Vend. (14th ed.) 551; 1 Dav. Con. (3d ed.) 115; Houseman's Conveyancing, 52, 207. Thus in one of the most recent treatises it is said that covenants by mortgagees "are unrestricted and amount to a warranty against and for the acts and omissions of the whole world." Goodeve's Modern Law of Real Property (3d ed., 1885, containing also Notes on the Real Property and Conveyancing Act, 1881–82), 206. And it will be seen that in the Conveyancing Act, 1881, the implied covenants in a mortgage are unlimited. *Supra*, § 20.

tice on this side of the Atlantic.[1] In some of the States, as in Pennsylvania, mortgages contain no covenants for the title.[2] It has, moreover, been already said, that in common leases, as the title is not inspected, the lessor should covenant against all persons whomsoever.[3]

§ 27. Where, however, the vendor does not claim by purchase, in the popular signification of the term, that is by way of sale for a valuable consideration, a purchaser is entitled, as a general rule, to require covenants extending to the acts of the last person who thus claimed by purchase.[4] "And this," says Sugden,[5] "is the universal and settled practice of conveyancers. For instance, if I sell an estate which was devised to me, and the devisor's father purchased the estate, the covenants for title are extended to the acts of the father."[6] On this side of the Atlantic the same practice has at times been recognized.[7]

[1] Lockwood *v.* Sturdevant, 6 Conn. 384; Lloyd *v.* Quimby, 5 Ohio, 262; Butler *v.* Seward, 10 Allen, (Mass.) 466.

[2] Except those implied by statute from the words "grant, bargain, and sell." See *infra*, Ch. XII.

[3] Barton's Conv. 75; see Calvert *v.* Sebright, 15 Beav. 156; Dart on Vend. (5th ed.) 549.

[4] In the old case of Pool *v.* Pool, 1 Chancery Rep. 18, "the plaintiff, being ordered to perform his father's covenants, refused, insisting that he is not chargeable with his father's covenants as heir, the land being conveyed to him, nor as executor, having no assets. This court ordered that the said plaintiff shall seal the said covenant according to the said articles of his father, and thereby covenant to free the premises from leases and incumbrances, or stand committed to the Fleet." In referring to this case in Hill *v.* Ressegieu, 17 Barb. (N. Y.) 167, the court said, "No doubt the son had notice, and I suppose these covenants were against his own acts."

[5] Sugd. on Vend. (14th ed.) 574.

[6] This rule has not, however, been always adopted by the Court of Chancery. Lord Hardwicke once said that he had never heard nor did he know of such a rule; "it would be unreasonable to extend the covenants to the first purchaser, when a family have been for several generations in possession of the estate, for they may have had the benefit of the statute of limitations and other bars in their favor, and therefore carrying it no further back than the person under whom the present vendor claims is sufficient." Loyd *v.* Griffith, 3 Atkyns, 267; but see this case, *infra*, p. 45, n. 1. As to the extent of covenants in settlements, see *supra*, § 20, p. 25. Although the *dictum* of Lord St. Leonards there quoted (note 2) from Monypenny *v.* Monypenny, 9 H. L. C. 114, 133, makes no distinction between estates descended or devised and those bought by the settlor, yet if, according to what seems the better practice, vendors' covenants are to be inserted in the settlement, the distinction is as valid as in sales. In his treatise on Vendors he says: "A person claiming under a voluntary conveyance is considered in the same light as a devisee." Sugd. on Vend. (14th ed.) 574. Dart, little inclined in general to agree with Sugden, cites the sentence in the text without dissent, and adds: "The courts would probably at the present day be inclined to sanction such practice by decision." Dart on Vend. (5th ed.) 545.

[7] Hill *v.* Ressegieu, *supra;* Hyatt *v.* Seeley, 1 Kern. (N. Y.) 56; Holman *v.* Criswell, 15 Tex. 399.

The theory of English conveyancers, in thus obtaining covenants against the acts of all those not actually claiming by purchase, is that there may be no one in the chain of title against whose acts there is not a covenant.[1]

[1] "Although in theory," says Sugden (Vend., 14th ed., 575), "a purchaser is entitled to a regular chain of covenants for title running with the land and extending to the acts of the successive owners of the property, yet practically he is entitled to no such thing, but must rest content with the covenants obtained by former owners, whether they run with the land or are collateral to it, and whether they keep up the chain of liability or leave it altogether broken and disconnected. This observation does not apply to the covenants for title to which a purchaser is entitled from his immediate seller." In Humphrey on Real Property, a work not more remarkable for the concise and clear view of the actual law which it contains than for the deficiency of the code by which the author proposed to remedy the evils he so pointedly showed to exist, he remarks: "The professed rule is that there should be a chain of covenants throughout the title, connecting those of the alienor with those of the preceding owner who has last covenanted. To this rule, however, there are the following several objections of expediency and of precedent. First, such a qualified warranty never actually enters the contemplation of the contracting parties. Whoever acquires land at its full value expects an equally complete or indefeasible title to it. The notion of concatenated fractions of an entire obligation, rendering the alienor answerable for the faults of the first link only, and then referring the alienee, for all prior defects, to the exhausted assets of long-deceased strangers, is too revolting to suppose it would be accepted as a guaranty by any purchaser to whom it was once explained. Should it be urged, you have the title to inspect, he would reply, such are the complications of real property and the inadequate means of search, that with all reasonable diligence defects must often remain undiscovered, and a purchaser is not concluded by *latent* faults. Under the Roman law, the seller, on the eviction of the purchaser, was answerable to him for the loss, under certain qualifications interposed for the protection of the former. The Code Napoleon (1826–1840), in framing which both precedent and principle were fully discussed (and the subject is a general one), imposes an absolute warranty on a seller, in case of eviction, to be answered in damages, the amount of which is chiefly regulated by the price, and by subsequent permanent improvements." Humphrey on Real Property, 77.

In a sale of land, as of any other *res mancipi*, at the early Roman law, the vendor usually entered into a stipulation by which he warranted to the vendee full legal ownership (*dominium ex jure Quiritium*), and thereby impliedly bound himself to defend the title (*præstare auctoritatem*) against all claims whatever, or pay to the vendee, if he should be judicially evicted, twice the value of the property. If such a stipulation was omitted, the transfer of free and entire possession (*vacuam possessionem*) fulfilled the vendor's whole duty. At a later period, this stipulation gave place to the less formal *stipulatio duplæ*, or promise to pay the vendee, if evicted, double the purchase price. Finally, in the time of Justinian, warranty against eviction had become so general as to be considered an obligation implied in the mere sale. If, therefore, the vendee was evicted at the suit of a third person, the vendor was bound to indemnify him, even though no express promise to that effect had been made. This warranty against eviction, though originally confined to the acts of the vendor and those claiming under him, or perhaps indeed to the acts of the vendor only, was finally extended to judicial eviction by any one.

There was also implied in every sale a warranty by the vendor against hidden faults, among which, by a classification probably less scientific than arbitrary, were included incumbrances (*servitutes*). See

§ 28. But it is difficult to determine by general and precise rule what, on this side of the Atlantic, are the "usual covenants" — that is to say, the covenants which a vendor should give and a purchaser expect — as owing to various causes the practice of conveyancing differs widely in the two countries.[1] It is obvious that much of the practice which prevails where the state of society has long been permanent, the titles old, and to a greater or less extent carefully examined at every purchase, loses its application in a comparatively new country, and the same covenants which might satisfy a purchaser in England or Massachusetts might not satisfy a purchaser in Idaho or Wyoming. As precision of conveyancing increases, a purchaser is less anxious for general covenants than where he buys in comparative ignorance of the title, and relies upon such covenants for his protection.[2] Hence a great difference will be found to exist as to the practice, not only on the different sides of the Atlantic, and among different States, but even between different parts of the same State.

§ 29. Thus in Pennsylvania it is decisively settled that as a general rule a purchaser has no right to expect covenants of greater scope than against the acts of the vendor and those claiming under him, and that an agreement to convey "by a warranty deed" means a deed with special warranty,[3] while at the same time it is considered that no suspicion of the title can properly arise in case the deed should contain general covenants.[4] It is

Maynz, Droit Rom. (4th ed.) t. ii. §§ 210–213; Mackeldey, Handb. of Rom. Law, § 403; Tomk. & Jenck., Mod. Rom. Law, pp. 366–368; Sandars's Justin., lib. iii. tit. xxiii. 182.

[1] The absence of a general system of registration is of course one of the principal of these causes, and the vexatious questions which there arise as to the purchaser's right to a production of the vendor's prior title-deeds are unknown in this country.

[2] See the remarks of Huston, J., in Whitehead *v.* Carr, 5 Watts, (Pa.) 369, and Spencer, J., in Pitcher *v.* Livingston, 4 Johns. (N. Y.) 14.

[3] Withers *v.* Baird, 7 Watts, (Pa.) 229; Espy *v.* Anderson, 14 Pa. 312; Cadwalader *v.* Tryon, 37 id. 322; Lloyd *v.* Farrell, 48 id. 78.

[4] Cresson *v.* Miller, 2 Watts, (Pa.) 276; Forster *v.* Gillam, 13 Pa. 343. "General warranties," said Rogers, J., in Cresson *v.* Miller, "are taken *ex abundante cautela*, and not because the purchaser had the least reason to suspect that the title was defective. A purchaser taking a deed with a general warranty forms not the slightest presumption that the title he received was doubtful, or that he knew it to be such. The idea seems to be that if he fails to recover the land he has his remedy over against the vendor, and that therefore he can be in no better situation than the vendor. It is apparent, however, that in a great majority of instances a vendee cannot obtain adequate relief. Without insisting upon the occasional insolvency of the vendor, he cannot be compensated for the increased value of the land

believed that in the large cities of that State, in ordinary cases, a covenant of warranty limited to the acts of the vendor and those claiming under him and in some instances carried back to the last person claiming by purchase[1] is the only express covenant for title inserted in the conveyance. But while this is so, it is believed that outside of those cities a purchaser generally expects, and a vendor rarely hesitates to give, a covenant of general warranty, as it seems to be sometimes thought that if the latter is only willing to covenant against his own acts he must know there is something defective about the prior title. In a case in the Supreme Court of the United States,[2] Story, J., referred to a deed with special warranty only, as being "a significant circumstance," in affecting a purchaser with notice of a paramount title;[3] but there would appear to be equal reason for the opposite argument that a deed with general warranty was as significant a circumstance, that unless there had been something wrong about the title the purchaser would not have demanded a general covenant, and that he intended to run the risk of the defect and rely on the covenant for his protection. In the absence of local usage, it would seem that no presumption of notice can properly arise either from the absence or presence of unlimited covenants, and where it is, as some of the cases say, the invariable usage in a State to insert general covenants, the presence in the deed of limited covenants is only a ground of presumption of mutual knowledge, or at least of suspicion, of some defect of title.[4]

§ 30. In Massachusetts and many other States, two kinds of deeds seem to be in general use — a "warranty deed" and a "quitclaim deed" — the form of which, as given by the latest authorities, is exactly similar with the exception of the covenants for title. In the "warranty deed" these are that the grantor is

arising from his industry and skill, or from the employment of his capital in erecting valuable improvements on the premises." The language of the court below, in the prior case of Robinson *v.* Justice, 2 Pa. (old Pa., not Pa. St.) 19, that "the circumstance of the deed's containing a general warranty renders it probable that the purchasers knew the title not to be without suspicion," was considered, upon error, to have been merely an expression of opinion upon the facts before the court.

[1] Thus in case of a conveyance by heirs or devisees it is customary to extend the covenant to the acts of the intestate or testator, and sometimes, as stated in the text, they are carried back to the last person claiming by purchase in its popular sense. See *supra*, § 27.

[2] Oliver *v.* Piatt, 3 How. (S. C. U. S.) 410.

[3] Such also seems to have been thought in Woodfolk *v.* Blount, 3 Hay. (Tenn.) 147.

[4] Miller *v.* Fraley, 23 Ark. 743; Lowry *v.* Brown, 1 Cold. (Tenn.) 459; Littler *v.* City of Lincoln, 106 Ill. 353.

seised in fee simple, that the premises are free from incumbrances, that he has good right to sell and convey them, and that he and his heirs, executors, and administrators will warrant and defend them to the grantee and his heirs and assigns forever against the lawful claims and demands of all persons; in other words, the covenants are general or unlimited. In the "quitclaim deed" the covenants are that the premises are free from all incumbrances made or suffered by the grantor, and that he and his heirs, executors, and administrators shall warrant and defend the same to the grantee, his heirs and assigns, against the lawful claims and demands of all persons claiming by, through, or under him, but against none other; in other words, the covenant for seisin and right to convey are omitted, and the covenants against incumbrances and of warranty are limited or qualified.[1]

§ 31. In Virginia, it has been consistently held that the practice is different from that in England, and that a general covenant of warranty is usually required and given.[2] So in Kentucky,

[1] Crocker's Notes on Common Forms (2d ed.), 4, 90. Without this explanation, the case of Kyle *v.* Kavanagh, 103 Mass. 359, might mislead, as it was there said by the court: "The plaintiff requested the court to instruct the jury that if by the contract 'the defendant was to take his conveyance from the grantor if he found the title good in him, all he could claim was a quitclaim deed.' The court instructed the jury that the defendant was entitled to a warranty deed unless he waived it and agreed to take some other form of conveyance. We are of opinion that this ruling was erroneous. . . . If the grantor has in fact a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty. An agreement or covenant to convey a good title, therefore, does not necessarily entitle the covenantee to a warranty deed." This, however, meant that in Massachusetts, as in England, a vendor is not required to covenant beyond his own acts, and therefore that a quitclaim, and not a warranty deed should be given: indeed, from the terms of the contract of sale in that case, the latter could not have been required from the vendor. And as between the vendee and creditors of the vendor, no presumption of fraud arises from the fact that the vendee's title rests upon a quitclaim deed. Mansfield *v.* Dyer, 131 Mass. 200; Grant *v.* Bennett, 96 Ill. 513. In Iowa, it is held that a vendee under a quitclaim deed is not to be regarded as a *bona fide* purchaser without notice; Watson *v.* Phelps, 40 Io. 482; Springer *v.* Bartle, 46 id. 688; but this does not affect a subsequent grantee with covenants of warranty from such vendee. Winkler *v.* Miller, 54 id. 477.

[2] Rucker *v.* Lowther, 6 Leigh, (Va.) 259; Hoback *v.* Kilgore, 26 Gratt. (Va.) 442. In Dickinson *v.* Hoomes, 8 id. 394, the language of Lord Eldon in Browning *v.* Wright, *supra*, was quoted and contrasted with the Virginia practice, which in Goddin *v.* Vaughn, 14 id. 117, it was said "may not be questioned." In Boggess *v.* Robinson, 5 W. Va. 402, it was held that in a bill to compel the specific execution of a decedent's verbal contract to convey, the heirs of the decedent could only be decreed to execute a deed with special warranty; but in Tavenner *v.* Barrett, 21 id. 656, the court, though holding that a deed with special warranty satisfied the requirements of the contract which the complainant sought to enforce, observed that "as a general rule upon an agreement for the sale of land, the vendor,

it was held at an early day to be both the settled rule and the practice in that State that unless there were a special contract to the contrary a general covenant of warranty must be given,[1] and such seems to be still the rule.[2] So in North Carolina, "when one makes a contract of sale for his own benefit there is an implication from the nature of the transaction that he will make a deed with general warranty."[3] So in Michigan, it has been held that the tender of a deed containing covenants against the acts of the vendor only was not a compliance with an ordinary contract of sale.[4] So in Indiana, a bond conditioned "for making a lawful title" was held to require "a general warranty deed containing the usual covenants,"[5] and although in a case in the Federal Court for that district it was considered that a bond conditioned to make "a good and general warranty deed with the fee simple annexed" did not require the insertion of a covenant for seisin,[6] yet in a later case the Supreme Court of that State held that an agreement to convey "by a good and indefeasible inheritance in fee simple" is not complied with by the tender of a deed with a general covenant of warranty merely, but that "a fair construction of the language of the bond makes it demand a deed with full covenants;"[7] and in a very recent case there it

though nothing be said in the contract on the subject, is considered as contracting for a general warranty;" and to the same effect is Allen *v.* Yeater, 17 id. 128.

[1] Steele *v.* Mitchell, Kent. Dec. 47.

[2] Fleming *v.* Harrison, 2 Bibb, 171; Vanada *v.* Hopkins, 1 J. J. Marsh. 293 (see Bodley *v.* M'Chord, 4 id. 475); Hedges *v.* Kerr, 4 B. Mon. 528; Andrews *v.* Word, 17 id. 520. In Slack *v.* Thompson, 4 Mon. 462, the express agreement was to give a covenant of quiet enjoyment, "without any trouble or molestation whatever," and the terms of the agreement would of themselves have been sufficient to prevail even against an opposite usage to the contrary.

[3] Faircloth *v.* Isler, 75 N. Car. 551. In the previous case of Gilchrist *v.* Buie, 1 Dev. & Bat. Eq. 357, the court, in adverting to the English practice of limiting the covenants to the acts of the vendor, said, "That position has never yet been laid down by us or our predecessors and would require very deliberate consideration before the adoption or repudiation of it."

[4] Dwight *v.* Cutler, 3 Mich. 579, where after citing the text the court added, "No doubt it is the general usage in this State, and probably in most of the Western States, to convey land by deeds containing the covenant of general warranty, upon the principle that an agreement to convey, where there is nothing to show a contrary intention, gives a right to the usual covenants for title;" and this was confirmed in the later case of Allen *v.* Hazen, 26 id. 143, and it is held obviously there and elsewhere that no particular form of words is necessary to constitute a covenant. It is a promise, and the question is, what is it the parties understood by it. Johnson *v.* Hollensworth, 48 id. 140.

[5] Clark *v.* Redman, 1 Blackf. (Ind.) 379.

[6] Kirkendall *v.* Mitchell, 3 McLean, 146, per McLean, J.

[7] Linn *v.* Barkey, 7 Ind. 70.

was said, "The law of this State is that an executory contract for a general warranty deed calls for a deed with full covenants."[1] So where in an early case in Ohio it was said that a contract for a good and sufficient deed is a contract "to convey the fee simple with covenant of warranty,"[2] it is presumed that a general warranty was meant.[3] So in Illinois, Minnesota, Missouri, and Arkansas, a covenant of general warranty seems to be required,[4] and it is presumed that the same rule prevails in the States more recently admitted into the Union and also in the Territories, where the titles are comparatively newer.[5] But it is probable that with the increase of care in the examination of the title the purchaser's right to unlimited covenants will be narrowed. And it is scarcely necessary to say that whatever may be the local usage on this point it will be always subject to be controlled by the express terms of the articles of sale.[6]

So, too, in some States, the covenant of warranty (whether general or limited) is usually the only one inserted in the deed.[7] In

[1] Bethell *v.* Bethell, 92 Ind. 318.

[2] Tremain *v.* Liming, Wright, 644.

[3] So it is presumed that general covenants are intended by the expression in a rather late case in Vermont, "The several covenants of seisin and against incumbrances are covenants which, under the form of conveyances in this State, are usually inserted in deeds of that character, and when an agreement is made for a warranty deed a deed with these covenants would be intended," (Bowen *v.* Thrall, 23 Verm. 385,) and the covenant of warranty in the deed in question was a general or absolute one. So in Rhode Island, in Point Iron Works *v.* Simmons, 11 R. I. 496.

[4] Clark *v.* Lyons, 25 Ill. 105; Johnston *v.* Piper, 4 Minn. 195; Herryford *v.* Turner, 67 Mo. 296; Witter *v.* Biscoe, 13 Ark. 422; though it is also obviously held that a deed without covenants is as effectual to pass a present estate as one with full covenants, the latter being only separate contracts; Bagley *v.* Fletcher, 44 id. 153; and equally obviously, the "usual covenants" mean those of the vendor and not of a stranger; Rudd *v.* Savelli, id. 145.

[5] Johnston *v.* Piper, *supra;* Taul *v.* Bradford, 20 Tex. 264; Rhode *v.* Alley, 27 id. 445; Little *v.* Allen, 56 id. 133; Allen *v.* Yeater, 17 W. Va. 128; Tavenner *v.* Barrett, 21 id. 656. In such States it is presumed that the remark of Spencer, J., in the old case of Pitcher *v.* Livingston, 4 Johns. (N.Y.) 14, might apply, that it was rare for the purchaser to investigate the seller's title and that he mostly relied upon his covenants.

[6] As in Holland *v.* Rogers, 33 Ark. 251.

[7] As an illustration of this, it was said by Lumpkin, J., in Leary *v.* Durham, 4 Ga. 601: "I can say with truth, after a practice of more than a quarter of a century, that I never saw a deed containing, in so many words, definite and precise covenants of seisin, right to convey, for quiet enjoyment, against incumbrances, and for further assurance. These are all designed to be included in the general covenant of warranty of title against all claims." Substantially the same remarks were made in the recent case of Green *v.* Irving, 54 Miss. 454. See also Stewart *v.* West, 14 Pa. 336; Caldwell *v.* Kirkpatrick, 6 Ala. 61; and *infra,* Ch. VIII. In some of the States, as in Georgia, it has been recently provided by statute, that "A general warranty of title against

others, however, it is customary to insert most or all of the five covenants for title.[1]

Upon the whole, it would seem that the question "what are the usual covenants" is, or may often be, one of fact rather than of law. In England, such a question as to a lease has been, in a court of law, considered to be one for the jury,[2] while in equity it has been referred to a master,[3] and in a somewhat recent case in New Jersey it was suggested that the same practice might be adopted as to what were the usual covenants in a deed in a given locality.[4]

§ 32. Owing to looseness of expression in contracts of sale, questions have even arisen whether the contract was not substantially complied with by the tender of a deed containing covenants for the title, although the title itself might be defective. Thus it was held in the early case in New York of Gazley *v.* Price[5] that an agreement "to give a good and sufficient deed for the premises" related merely to the sufficiency of the conveyance to pass whatever estate the vendor had, and in a subsequent case[6] a similar construction was given to a contract to give "a good warranty deed of conveyance of the land."[7] But these decisions

the claims of all persons includes in itself covenants of a right to sell and of quiet enjoyment and freedom from incumbrances." Rev. Code, 1882, sec. 2702, and see *infra*, Ch. XII. for other statutory provisions as to covenants.

[1] See 4 Kent's Com. 471; 3 Washburn on Real Property (5th ed.), 477; McKleroy *v.* Tulane, 34 Ala. 83; Murphy *v.* Lockwood, 21 Ill. 618.

[2] Bennett *v.* Womack, 3 Car. & Payne, 96, per Lord Tenterden; s. c. on motion for a new trial, 7 Barn. & Cress. 627.

[3] Henderson *v.* Hay, 3 Bro. Ch. 632.

[4] Wilson *v.* Wood, 2 C. E. Green, (N. J.) 216. What are "customary covenants," said the court, in Gault *v.* Van Zile, 37 Mich. 23, "would be determined by the *lex rei sitæ*." Where there is no difficulty as to the practice, of course the court must decide from the contract itself. Thus where, in Onslow *v.* Londesborough, 10 Hare, 67, the contract provided for "one or more proper and sufficient covenant or covenants" for the production of title papers, the court said, "The question is, what is the meaning to be attached to the word 'sufficient'? Was it meant to import that the vendors (to whom the deeds were to be delivered and who were to covenant for their production) were to have a covenant or covenants which at all times and under all circumstances should secure to them the production of the deeds, or merely that the vendors should have such a covenant or covenants as according to the ordinary practice and the views of this court would be deemed to be sufficient?" and it was held that the word "sufficient" was qualified by the word "proper."

[5] 16 Johns. 267, per Spencer, J.

[6] Parker *v.* Parmele, 20 Johns. 132.

[7] So, apparently, in Clark *v.* Lyons, 25 Ill. 105 (but see the later cases there, *infra*, p. 41, n. 5), and so in a case in Massachusetts, where the agreement was to give a good and sufficient warranty deed of the premises, it was held that "the words 'good and sufficient' relate only to the validity of the deed and do not imply that the title was valid, or that it was free

are opposed both to prior and to subsequent authorities in the same State upon articles substantially similar, and cannot be considered as law at the present day either there or elsewhere. Thus in a previous case [1] it had been held that an agreement to execute a good and sufficient deed for the premises did not mean merely a conveyance good in point of form — that would be a conveyance without substance — but it meant an operative conveyance, one that carried with it a good and sufficient title to the land conveyed; [2] and in a subsequent case [3] Chancellor Walworth was clearly of opinion that "an agreement to convey land by a good and sufficient warranty deed was not complied with by the mere giving of a warranty deed, where the grantor had no title to the land or when his title was imperfect; it must be a deed good and sufficient both in form and substance to convey a valid title to the land which the covenantor has agreed should be conveyed." [4] These principles are sustained by a great weight of authority,[5] and in a later case in New York all the authorities

from incumbrance. To guard against any defect of title, a covenant of warranty was provided for, which shows clearly that the agreement was so understood by the parties." Tinney *v.* Ashley, 15 Pick. 552, approving Gazley *v.* Price. The same court seemed disposed to take the same view of the law in an early case, Aiken *v.* Sanford, 5 Mass. 499; though it was said in that case, as in Swan *v.* Drury, 22 Pick. 489, and Tharin *v.* Fickling, 2 Rich. L. (S. C.) 364, "that if the money was to be paid on receiving the deed, it might be a reasonable construction that a good and sufficient title should be conveyed." See also Mead *v.* Fox, 6 Cush. (Mass.) 202.

[1] Clute *v.* Robinson, 2 Johns. 595, per Kent, C. J.

[2] So in Jones *v.* Gardner, 10 Johns. 266, and Judson *v.* Wass, 11 id. 528.

[3] Everson *v.* Kirtland, 4 Paige, (N. Y.) 638.

[4] So in Carpenter *v.* Bailey, 17 Wend. (N. Y.) 244; Traver *v.* Halstead, 23 id. 66; see Winne *v.* Reynolds, 6 Paige, (N. Y.) 411.

[5] Hunter *v.* O'Neill, 12 Ala. 39; Flinn *v.* Barber, 64 id. 193; Tarwater *v.* Davis, 3 Eng. (Ark.) 153; Lewis *v.* Boskins, 27 Ark. 61; Thayer *v.* White, 3 Cal. 229; Haynes *v.* White, 55 id. 38; Mitchell *v.* Hazen, 4 Conn. 495; Dodd *v.* Seymour, 21 id. 480; Clark *v.* Croft, 51 Ga. 368; Brown *v.* Cannon, 5 Gilman, (Ill.) 174; Morgan *v.* Smith, 11 Ill. 199; Thompson *v.* Shoemaker, 68 id. 256; Clark *v.* Redman, 1 Blackf. (Ind.) 379; Shreck *v.* Pierce, 3 Cl. (Io.), 360; Brown *v.* Starke, 3 Dana, (Ky.) 318; Andrews *v.* Word, 17 B. Mon. (Ky.) 520; Porter *v.* Noyes, 2 Greenl. (Me.) 22; Brown *v.* Gammon, 14 Me. 276; Hill *v.* Hobart, 16 id. 164; Swan *v.* Drury, 22 Pick. (Mass.) 488; Mead *v.* Fox, 6 Cush. (Mass.) 202; Dwight *v.* Cutler, 3 Mich. 575; Greenwood *v.* Ligon, 10 Sm. & Marsh. (Miss.) 615; Feemster *v.* May, 13 id. 275; Mobley *v.* Keys, id. 677; Luckett *v.* Williamson, 31 Mo. 54; s. c. 37 id. 395; Herryford *v.* Turner, 67 id. 296; Carter *v.* Alexander, 71 id. 585; Little *v.* Paddleford, 13 N. H. 167 (settling the doubt suggested in Beach *v.* Steele, 12 id. 89); Gilchrist *v.* Buie, 1 Dev. & Bat. Eq. (N. C.) 347; Lee *v.* Foard, 1 Jones Eq. (N. C.) 127; Pugh *v.* Chesseldine, 11 Ohio, 109; Cameron *v.* Carter, 9 Ont. 426; Collins *v.* Delashmutt, 6 Ore. 51; Sanford *v.* Wheeler, 12 id. 301; Dearth *v.* Williamson, 2 Serg. & Rawle, (Pa.) 498; Romig *v.* Romig,

were considered and Gazley *v.* Price was directly overruled,[1] and the latest decisions in that State have adhered to this ruling.[2] It is possible that some cases which seem to be not in harmony with others may be reconciled by reason of the peculiar words of the contract.[3]

The rule of construction of such cases is sufficiently obvious. It is familiar that the general principles of the contract of sale, both in this country and in England, recognize and enforce, while it is still executory, the right of a purchaser to a title clear of defects and incumbrances. This right is one not growing out of the agreement of the parties but is given by the law,[4] and it naturally follows that a court of equity will not decree the specific performance of a contract where the title is bad or even doubtful.[5] Hence, when an incumbrance exists which it was not agreed should enter into and form part of the consideration, the vendor must discharge it before he can call for a completion of the sale.[6]

2 Rawle, (Pa.) 249; Eby *v.* Eby, 5 Pa. 466 (see Moore *v.* Harrisburg Bank, 8 Watts, Pa. 149); Colwell *v.* Hamilton, 10 Pa. 415; Wilson *v.* Getty, 57 id. 270; Cunningham *v.* Sharp, 11 Humph. (Tenn.) 120; Vardeman *v.* Lawson, 17 Tex. 16; Jones *v.* Phillips, 59 id. 610; Stow *v.* Stevens, 7 Verm. 27; Lawrence *v.* Dole, 11 id. 549; Joslyn *v.* Taylor, 33 id. 470; Goddin *v.* Vaughn, 14 Gratt. (Va.) 117; Christian *v.* Cabell, 22 id. 82; Davis *v.* Henderson, 17 Wis. 106; Watts *v.* Waddle, 1 McLean, (C. C. U. S.) 200. In New Jersey, after some little variation of decision (Johnson *v.* Smock, Coxe, 106; Barrow *v.* Bispham, 6 Hals. 110; Tindall *v.* Conover, 1 Spen. 214), the law is now considered as settled "in harmony with the weight of authority." Tindall *v.* Conover, 1 Zabr. 654; Lounsbery *v.* Locander, 25 N. J. Eq. 557.

[1] Pomeroy *v.* Drury, 14 Barb. S. C. (N. Y.) 424, the court saying, "I think it may be safely said that Gazley *v.* Price and Parker *v.* Parmelee are no longer authorities for holding that a covenant to convey lands by warranty deed on a sale refers only to the form and sufficiency of the deed, and not to the title conveyed." The decisions in question had also been virtually overruled in Fletcher *v.* Button, 4 Comst. 400.

[2] Hill *v.* Ressegieu, 17 Barb. S. C. (N. Y.) 164; Atkins *v.* Bahrett, 19 id. 639; Burwell *v.* Jackson, 5 Seld. 536; Penfield *v.* Clark, 62 Barb. 584; Morange *v.* Norris, 3 Abb. App. Dec. 314.

[3] Such as in Brizzolara *v.* Mosher, 71 Ill. 41; Fitch *v.* Willard, 73 id. 92; Allen *v.* Atkinson, 21 Mich. 361; Baxter *v.* Audrey, 41 id. 13; Harrison *v.* Guerin, 27 N. J. Eq. 219. Thus an agreement to convey all the vendor's interest in a certain lot "meaning the same interest which was deeded to him by P." was held to bind the vendor only to a conveyance of that interest; Babcock *v.* Wilson, 17 Me. 372; and see the distinction noticed in Joslyn *v.* Taylor, 33 Verm. 475.

[4] Souter *v.* Drake, 5 Barn. & Adolph. 999, per Denman, C. J.; Doe *v.* Stanion, 1 Mees. & Welsb. 701; Burwell *v.* Jackson, 5 Selden, (N. Y.) 536; Shreck *v.* Pierce, 3 Cl. (Io.) 360; Sugd. on Vend. (14th ed.).

[5] The rule in equity as to not compelling a purchaser to take "a doubtful title" was said in Marlow *v.* Smith, 2 P. Wms. 201, to be as old as Sir Joseph Jekyl's time, and in Sloper *v.* Fish, 2 Ves. & Beames, 149, it was said to have been repeatedly acted on by Lord Hardwicke. See the notes to Seton *v.* Slade, 2 Lead. Cas. in Eq. (5th ed.) 501.

[6] Sugd. on Vend. (14th ed.) 548; Cameron *v.* Carter, 9 Ont. 426.

The law, then, recognizing *prima facie* a necessary implication of a good title in every contract for the sale of real estate, it follows that an agreement by which such a settled rule is to be waived should be unequivocally expressed, and as the law further recognizes the purchaser's rights to covenants for the title, it is difficult to perceive how an agreement to convey "by a sufficient warranty deed" (or words of similar import) can weaken that which is implied from the mere relation of vendor and purchaser.[1]

§ 33. The second class of vendors is that of fiduciary vendors, such as trustees, executors (whether selling in exercise of a power or under authority of a decree), mortgagees, assignees of bankrupts, insolvents, and the like.

As to the "usual covenants" to be given by them, there being an obvious difference between this class of vendors and those who sell in their own right, the practice is perhaps equally well settled on both sides of the Atlantic, and the rule may be said to be a general one that from a fiduciary grantor, having either no interest in the subject of the sale or merely a naked legal title, the grantee is entitled to no covenants but that the grantor has done no act to incumber the estate, which is generally called the "usual trustee covenant;"[2] it being evident that few persons could be found to act in a fiduciary or representative capacity if they were compellable to enter into covenants of greater scope;[3] nor can

[1] Vardeman *v.* Lawson, 17 Tex. 16.

[2] *Infra*, p. 44.

[3] The rule with respect to trustees and executors may be found in Staines *v.* Morris, 1 Ves. & Beames, 10; Worley *v.* Frampton, 5 Hare, 560; Worthy *v.* Johnson, 8 Ga. 236; Redwine *v.* Brown, 10 id. 311; Aven *v.* Buckom, 11 id. 1; Chastain *v.* Staley, 23 id. 26; Brackenridge *v.* Dawson, 7 Ind. 387; Dwinel *v.* Veazie, 36 Me. 509; Sumner *v.* Williams, 8 Mass. 201; Hodges *v.* Saunders, 17 Pick. (Mass.) 476; Barnard *v.* Duncan, 38 Mo. 181; Ennis *v.* Leach, 1 Ire. Eq. (N. C.) 416; Shontz *v.* Brown, 27 Pa. 134; Grantland *v.* Wight, 5 Munf. (Va.) 295; Allen *v.* Winstow, 1 Rand. (Va.) 71; Goddin *v.* Vaughn, 14 Gratt. (Va.) 102; and with regard to assignees, in Wilkins *v.* Fry, 1 Mer. 244; White *v.* Foljambe, 11 Ves. 345; Fleming *v.* Holt, 12 W. Va. 162; and see the cases cited *infra*, and where in Atty. Gen. *v.* Morgan, 2 Russell, 306, the court cancelled a lease as having been improperly granted by trustees of a charity, it refused, on the application of the lessee, to suffer the covenants of the trustees to remain.

It is presumed, however, that where the vendor had an interest as well as a power, he would always be obliged to covenant personally to the extent of that interest. Barton's Conv. 73; Hare *v.* Burges, 4 Kay & Johns. 57. It might be thought reasonable that fiduciary vendors should covenant for further assurance, but the practice has been otherwise, Barton's Conv. 70, and it has been recently settled that this cannot be exacted of them. Worley *v.* Frampton, 5 Hare, 560. It has, however, been held that if trustees under a will

any covenants for title be implied against them from any words of grant or leasing.[1]

The form of a trustee covenant in the Conveyancing and Law of Property Act, 1881, (by which certain covenants are implied from the words of grant,) is as follows: "That the person so conveying has not executed or done, or knowingly suffered,[2] or been party or privy to,[3] any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in any wise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed."[4]

§ 34. But although other covenants cannot be demanded from a fiduciary vendor, yet it is the practice in England for the purchaser to insist on covenants from the parties beneficially interested in the purchase money, at least in the case of *cestuis que trust*.[5] The practice of the profession, however, as to this,

come into equity to compel specific performance by the vendee of a contract made with their testator as vendor, they will be compelled to covenant for the title in the same manner as he was to have done. Page *v.* Broom, 3 Beavan, 36. So, too, it has been held that the executors of one who had agreed to take a lease may, if they admit assets, be compelled to enter into a lessee's covenants, so qualified as to restrict their liability to that which they would have incurred had the lease with corresponding covenants been executed by their testator. Philips *v.* Everard, 5 Simons, 102; Stephens *v.* Hotham, 1 Kay & Johns. 571. "These decisions," says Dart, "are, perhaps, difficult to be reconciled with that in Worley *v.* Frampton, and seem to consist better with the general principle of equity that persons who agree to stand in the place of another represent his liabilities as well as his rights. They also suggest whether the personal representatives of a deceased vendor or purchaser might not be required to join in the conveyance, and, to the extent of the assets, to enter into special covenants which the deceased had agreed to enter into." Dart on Vend. (5th ed.) 551.

[1] Dow *v.* Lewis, 4 Gray, (Mass.) 473; Webster *v.* Conley, 46 Ill. 14. In Knipe *v.* Palmer, 2 Wilson, 130, it seems to have been thought that where the committee of a lunatic, having no power either in that case or at common law to lease the lands of the lunatic, nevertheless did so, he would be liable on the covenant implied by the word *demise*, but this comes within another rule which is considered *infra*.

[2] The benefit of the word "suffered" is shown in Rowley *v.* Bent, L. R. 3 Eq. 761.

[3] The importance of the phrase "being party or privy to" is shown by Hobson *v.* Middleton, 6 Barn. & Cress. 295, where it was held that the fact of the covenantor having *assented* to an act which he could not prevent, was not a breach of a covenant that he had not "permitted or suffered any act, matter, or thing," &c. In the recent case of Clifford *v.* Hoare, L. R. 9 C. P. 362, judgment was given for the defendant upon another point, but the court was of opinion that but for this he would have been liable as "party or privy" to the act complained of.

[4] L. R. xvii. Stat. 119.

[5] And such was distinctly required in the recent case in Illinois of Crabtree *v.*

was not for some time enforced or even recognized by the Court of Chancery,[1] and it has not been until recently that it has at

Levings, 53 Ill. 526. "It always has been, and still is, the practice of the profession," says Sugden, "to make all the *cestuis que trust* whose shares of the purchase money are in any wise considerable, join in covenants for the title according to their respective interest." "A bankrupt," he continues, "is generally made a party to the conveyance of his estate, to prevent the difficulty which the purchaser might otherwise be put to in maintaining and proving the title, and the bankrupt is generally made to enter into covenants for title in the same manner as he would have done had he sold the estate while solvent." Sugd. on Vend. (14th ed.) 574, 575. It seems, however, that the bankrupt cannot be *compelled* to do this, and his concurrence is rather matter of favor than of right; *Ex parte* Crowder, 2 Rose, 327; Waugh *v.* Land, Cooper, 132; Sugd. on Vend. (14th ed.) 575; and it is apprehended that this would equally apply to conveyances made by assignees for the benefit of creditors under insolvent laws. "Upon a sale by trustees," says Davidson, "under a will for general purposes, or by order of court, the purchaser is not entitled to any covenant for title but that against incumbrances, except (in the case of a will) when the purposes to which the purchase money is primarily applicable have since been satisfied, so that the substantial owners are in fact ascertainable; in practice, however, it is usual in every case to insert covenants by the parties who are beneficially entitled in any considerable amount to the residue of the purchase money." 2 Dav. Con. (2d ed.) 203, note. In Tennessee it is provided by statute, that "where a sale of the real estate of a decedent is made by decree of court for the payment of debts, where the sale is made at the voluntary instance of parties, the decree or deed of the clerk shall imply a covenant of seisin, and warranty of title by the parties whose interest is sold, their heirs and representatives, unless otherwise provided in the face of the decree." Code of Tennessee, 1884, p. 922, sec. 4880.

[1] The practice was condemned by Lord Loughborough in Wakeman *v.* Duchess of Rutland, 3 Vesey, 233, 504, affirmed on appeal, 8 Brown's Parl. Cas. 145. The decision was, however, against the opinion of the profession, and is according to Sugden by no means an authority that *cestuis que trust* of money to be produced by the sale of estates devised to trustees to sell cannot in any instance be required to covenant for the title. "Where the money to arise by sale of the estate is absolutely given to two or more persons, they are substantially owners of the estate and must accordingly covenant for the title. So, even where the money is in the first place to be applied in payment of debts, yet if they are all paid previously to the sale, the *cestuis que trust* must, it is conceived, covenant for the title." Sugd. on Vend. (14th ed.) 574, 575. It may, moreover, be observed that Wakeman *v.* Duchess of Rutland was to some extent against the views expressed by Lord Hardwicke in Loyd *v.* Griffith, 3 Atkyns, 264, which case is, however, criticised by Mr. Platt, who says it appears to have been decided "rather with reference to particular circumstances than from any general principle." Platt on Covenants, 393. Dart considers that the above proposition of Sugden is too broadly stated. "Suppose that a testator devises an estate to trustees in trust to sell, and with power to give receipts, and to divide the proceeds among his children all of whom are *sui juris*. Here the beneficiaries, if all wish so to do, may elect that there shall be no sale, but to take the land as real estate. Any of the beneficiaries may, however, require the trustees to proceed to a sale, even against the wishes of their co-beneficiaries. Admitting that those who agree to a sale and join in the contract are bound to concur in the conveyance and to covenant for title to the extent of their interests, it does not occur to the writer that there is any mode by which the dissentients can be compelled so to concur and covenant. Nor does he conceive that if they refuse so to do their refusal would entitle the purchaser to rescind the con-

all received judicial approbation.[1] It would seem that the correct test of the application of such a rule would be the extent of the purchaser's liability to see to the application of the purchase money.[2] And somewhat lately, on a sale made under a decree, of real estate vested in trustees whose receipt was to be a good discharge, in order to divide the proceeds among the beneficiaries, it was distinctly held that the latter, notwithstanding

tract. If so, the inability of trustees for sale to procure the concurrence of all the beneficiaries amounts, in reality, to a defect in title." Dart on Vend. (5th ed.) 546.

[1] In the case of the London Bridge Acts, 13 Simons, 176, lands were devised to A. for life, remainder to B. for life, remainder to his sons successively in tail male. A. and B. during the infancy of B.'s eldest son obtained an act of Parliament, vesting the estate in trustees in trust to sell, and the Vice-Chancellor "apprehended that where the only persons who were immediately interested in the estates were tenants for life, it was the usual course to make them covenant for the title; that the tenants for life in this case stood in the same situation as if there had been a power to sell the estates with their consent, in which case it would be a matter of course for them to enter into the covenants." See also Page *v.* Broom, 3 Beavan, 35. In Barnard *v.* Duncan, 38 Mo. 182, this sentence was quoted, and the court added, "The matter would seem to depend upon the jurisdiction of a court of equity in a proper case, as where one of the parties should come into court to enforce specific performance against the other."

[2] Sugden says, "Where an estate is sold by trustees under a will, and the money is to be applied in payment of debts, &c., and the residue is given over, a purchaser is not entitled to any covenants for the title, because no line can well be drawn as to the *quantum* which would make a person liable to covenant. The same rule applies *ex necessitate* where an estate is sold for similar purposes under an order of a court of equity." Sugd. on Vend. (14th ed.) 574; and in a former edition he says, "If a different rule prevailed, the consequence would be that the estate could never be sold by decree till the account was taken of all the debts; because before that account was taken it could not appear who were to join in the conveyance, what was the number, and in what proportions they were beneficially entitled; but it is the constant practice to sell the estate in the first instance; of course the title can be made only by the trustees for sale, without calling on the parties who are presumptively beneficially interested." There would seem to be some reason why in America *cestuis que trust* should not be compellable to enter into covenants for title, which is, that the English doctrine, which in many cases obliges the purchaser to see to the application of the purchase money, is less regarded here (see the note to Elliot *v.* Merryman, 1 Lead. Cases in Eq., 4th Am. ed., 109), and the purchaser is therefore in less need of these covenants as a protection against the future claims of the parties beneficially interested, though as regards claims under an adverse paramount title it is obvious that this reason cannot apply.

The passage in the text was cited in Hill *v.* Ressegieu, 17 Barb. S. C. (N. Y.) 167, where it is said, "That liability [to see to the application of the purchase money] does not now extend to payments to the trustees made in good faith; 1 Rev. Stat. 730, 10 Paige, 282;" and it was held that where a vendor having covenanted to convey land free of all incumbrance died, leaving a widow and three heirs, one of whom was an infant, the infant was decreed to convey but without covenants, and the adult heirs were decreed to convey with covenants against their own acts. The same point as to covenants by infant heirs was decided in Hyatt *v.* Seeley, 1 Kern. (N. Y.) 56.

the practice of the profession, were not bound to covenant for the title.[1] But still more recently it seems to have been thought that this must be confined to the case of a sale under a decree.[2] It may be doubted, however, if this be the true test.[3]

§ 35. The question of the purchaser's right to covenants for the title from an agent acting under a power of attorney from his principal, has often arisen in cases where in a suit against the latter upon covenants made on his behalf by the agent the right so to bind the principal has been denied. In an early case in New York, it was assumed that as a deed without any covenants for the title was sufficient to pass the estate to the purchaser, the latter had no right to demand these covenants, and hence it was said that a power of attorney to sell and convey land, expressed in the usual form, implied no power to covenant for the title;[4] but the correctness of these decisions has often since been

[1] Cottrell *v.* Cottrell, L. R. 2 Eq. 330. "The purchaser has established," said Stuart, V. C., "that according to the practice of conveyancers he would be entitled to covenants for title from the beneficiaries. But it is equally clear that it is an oppressive practice and has not been adopted by this court as to sales made under its decree. The beneficiaries under a will are not contracting parties but mere volunteers, and it seems an arbitrary thing to hold that a legatee is to take nothing from the bounty of the testator until he has entered into covenants for title and possibly has been put to considerable expense."

[2] Earl Poulett *v.* Hood. L. R. 5 Eq. 115, Romilly, M. R. In that case, however, there was a tenant for life, as *In re* London Bridge Acts, *supra*, who, "finding that a sale of the term under the decree was not so advantageous, chose instead of that to sell under the power. Taking that course, he must take it with all the incidents, and one of them is that the tenant for life must covenant for the title."

[3] And, says Dart, "These questions upon sales under the decree or by the directions of the court are, according to the present practice, usually precluded by a special condition. And even in the case of private sales, it may be doubted whether the practice of conveyancers could be altogether enforced." Dart on Vend. (5th ed.), 546.

[4] Nixon *v.* Hyserott, 5 Johns. (N. Y.) 58. "The attorney was authorized," said the court, "to sell and to execute conveyances and assurances in the law of the land sold, but no authority was given to bind the principal by covenants. A conveyance or assurance is good and perfect without either warranty or personal covenants, and therefore they are not necessarily implied in an authority to convey; an authority is to be strictly pursued and an act varying in substance from it is void;" and to the same effect are Ryder *v.* Jenny, 2 Rob. (N. Y.) 68, and Howe *v.* Harrington, 3 C. E. Gr. (N. J.) 496. In Van Eps *v.* Schenectady, 12 Johns. (N. Y.) 436, Nixon *v.* Hyserott was approved, and it was held that a conveyance was perfect without any covenants for the title, and this was also the decision in Fuller *v.* Hubbard, 6 Cow. 22, and Willis *v.* Astor, 4 Edw. Ch. 595; and these cases have been approved in Connecticut; Mead *v.* Johnson, 3 Conn. 592; Dodd *v.* Seymour, 21 id. 480. Such a conveyance is certainly sufficient to pass the estate of the grantor, but is not, it is conceived, all that the purchaser has a right to expect. "The title is one thing, the covenants are other things, intended as a support of the title." Osborne *v.*

denied, and it is established by the weight of authority that as the law recognizes the right of a purchaser to covenants for the title from the principal it will not suffer that right to be defeated by the mere delegation by him of authority to consummate the contract.[1] Where, however, that authority is restricted in terms so express as to control that which the law otherwise implies, the rights of the purchaser will of course be limited by the letter of the instrument.

It is, however, a familiar rule that in general when parties contract *en autre droit* and bind themselves personally and fail to bind their principals, they are held personally responsible,[2] and the rule applies *a fortiori* to contracts under seal. This general doctrine was applied in England in a case [3] where one having covenanted on behalf of another to pay the purchase money of certain property he was held personally liable; the court holding that it was impossible to contend that where one covenants for another he is not to be bound for it, and the covenantee might prefer the security of the covenantor to that of his principal.[4]

§ 36. In this country it has often happened that fiduciary vendors have, perhaps from inadvertence, entered into covenants for title of greater scope than the law exacts of them, and in such cases it is well settled that the covenants are personally binding upon them. Thus where in a case in Massachusetts [5] the grantors "in their capacity as administrators" covenanted that they, administrators as aforesaid, were lawfully seised of the premises, that they were clear from all incumbrances except a certain mortgage and a right of dower, that they had, in their said capacity, good right to sell, and that as administrators aforesaid they would warrant and defend the premises, it was held that the cove-

McMillan, 5 Jones Law, (N. C.) 109. See *supra*, § 18; Kyle *v.* Kavanagh, 103 Mass. 359.

[1] Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 293; Hedges *v.* Kerr, 4 B. Mon. (Ky.) 528; Ward *v.* Bartholomew, 6 Pick. (Mass.) 410; Bronson *v.* Coffin, 118 Mass. 161; Hunter *v.* Jameson, 6 Ire. (N. C.) 252; Peters *v.* Farnsworth, 15 Verm. 155; Rucker *v.* Lowther, 6 Leigh, (Va.) 259; Le Roy *v.* Beard, 8 How. (S. C. U. S.) 451; Taggert *v.* Stanbury, 2 McLean, (C. C. U. S.) 543.

[2] See Story on Agency, § 263 *et seq.*, and Knipe *v.* Palmer, 2 Wilson, 130, cited *supra*, p. 44, n. 1.

[3] Appleton *v.* Binks, 5 East, 148.

[4] See to the same effect, Burrell *v.* Jones, 3 Barn. & Ald. 47; Kennedy *v.* Gouveia, 3 Dowl. & Ry. 503; Norton *v.* Herron, 1 Car. & Payne, 648. Of course, when the prineipal is bound, the agent or attorney is not. Kent *v.* Chalfant, 7 Minn. 491.

[5] Sumner *v.* Williams, 8 Mass. 162. There had been previous cases in that State to the same effect; Thacher *v.* Dinsmore, 5 id. 299; Forster *v.* Fuller, 6 id. 59.

nantors were personally bound to pay, out of their private estates, damages arising from an eviction of the covenantees. There could be no doubt, it was said, that the grantors did not intend that there should be any recurrence to themselves, and that they observed peculiar caution to avoid any idea of personal liability; and further, that the nature of the transaction, the character in which the grantors contracted, and the language of the instrument concurred in proving that such was the intention of both parties, while at the same time it must be confessed equally clear that both parties believed that the covenants were to be effectual in case of an interruption of the estate supposed to be granted, though probably neither of them contemplated the happening of such a contingency. On the occurrence of that contingency, however, the court was reduced to the alternative of pronouncing the covenants to be void and wholly ineffectual,[1] or of giving them operation against the defendants in their personal and individual capacity, and, however hard the alternative might be in subjecting the administrators to the payment of damages contrary to their intention, still it was said that the principle was one too deeply rooted to be unsettled. It was, moreover, well remarked, that while an administrator was not required by any duty of his office or trust to enter into a personal covenant for the perfection of the title or for the validity of the conveyance, beyond his own acts, yet it would be admitted that he was at liberty to do so if he chose thus to excite the confidence of purchasers and to enlarge the proceeds of the sale, and that he might be competent to engage his own credit collaterally in the conveyance. The rule thus stated is supported by many authorities, and by well-established principle.[2]

[1] That a covenant for title made by an administrator will not bind the estate is well settled; Worthy *v.* Johnson, 8 Ga. 236; Mason *v.* Ham, 36 Me. 573; Osborne *v.* McMillan, 5 Jones L. (N. C.) 109; Klopp *v.* Moore, 6 Kans. 30; Lockwood *v.* Gilson, 12 Ohio, 529; Shontz *v.* Brown, 27 Pa. 134; Mabie *v.* Matteson, 17 Wis. 11; and the same is true as to the right of trustees to bind the corporation which they represent unless expressly authorized so to do; Klopp *v.* Moore, *supra*. In Georgia, it is provided by statute that "An administrator cannot bind the estate by any warranty in any conveyance or contract made by him, nor is he personally bound by such covenant unless the intention of personal liability is distinctly expressed," Code, § 2563, and the provision seems to apply to all fiduciaries; Clark *v.* Whitehead, 47 Ga. 521; Shacklett *v.* Rawson, 54 id. 353. So as to sales under judicial process: "No covenant of warranty binds him (the officer or his agent) individually, unless made with that intention and for a valuable consideration." Code, § 2622.

[2] Craddock *v.* Stewart, 6 Ala. 77; Coe

§ 37. As to the third class of vendors, namely, ministerial vendors, such as sheriffs, marshals, tax collectors, and the like, it is obvious that no express covenants for title of any kind can be

v. Talcott, 5 Day, (Conn.) 92 ; Mitchell *v.* Hazen, 4 Conn. 495 ; Belden *v.* Seymour, 8 id. 24 ; Sterling *v.* Peet, 14 id. 245 ; Aven *v.* Beckom, 11 Ga. 1, where the subject is elaborately considered ; Mason *v.* Caldwell, 5 Gilm. (Ill.) 196 ; Foster *v.* Young, 35 Ia. 27 ; Klopp *v.* Moore, 6 Kans. 30 ; Graves *v.* Mattingly, 6 Bush, (Ky.) 361 ; Stinchfield *v.* Little, 1 Greenl. (Me.) 231 ; Glenn *v.* Allison, 58 Md. 527; Whiting *v.* Dewey, 15 Pick. (Mass.) 433 ; Donahoe *v.* Emery, 9 Metc. (Mass.) 66 ; Mellen *v.* Boarman, 13 Sm. & Marsh. (Miss.) 100 ; Murphy *v.* Price, 48 Mo. 247 ; Holyoke *v.* Clark, 54 N. H. 578 ; Godley *v.* Taylor, 3 Dev. (N. C.) 178 ; and see Osborne *v.* McMillan, 5 Jones L. (N. C.) 109 ; Lockwood *v.* Gilson, 12 Ohio, 529 ; Welsh *v.* Davis, 3 S. Car. (N. S.) 110 ; Taylor *v.* Harrison, 47 Tex. 454 ; Mabie *v.* Matteson, 17 Wis. 11 ; Duvall *v.* Craig, 2 Wheat. (S. C. U. S.) 56 ; Taylor *v.* Davis, 110 U. S. 330. Also an article in 7 Southern Law Rev. (N. S.) 832. Thus where an administratrix of her deceased husband conveys the land of the estate under order of court and covenants for the title, although she is not bound so to covenant, yet having done so the covenants will estop her from claiming dower in the land. Megee *v.* Mellon, 23 Miss. 586. And so as to a guardian, in Foster *v.* Young, *supra*.

It has, however, been held that where the covenantor expressly declares that his liability shall be no more than coextensive with his fiduciary capacity he will not be personally bound, even although the covenants carry with them no protection whatever to the covenantee. Thus in Thayer *v.* Wendell, 1 Gall. (C. C. U. S.) 37, Story, J., held that a covenant by an executor, in his "capacity of executor and not otherwise," created no personal liability, and that no man acting fairly and openly *in alieno jure* and not otherwise can be made answerable in his private capacity upon the contract. So where, in Day *v.* Browne, 2 Ohio, 347, the covenant was that the grantors would warrant and defend, "as executors are bound by law to do," the distinction was taken that, in the cases above referred to, the words *executor*, *trustee*, &c. amounted only to matter of description, but that as executors were not bound in that State to warrant at all, the words were used to qualify their responsibility. So, in Manifee *v.* Morrison, 1 Dana, (Ky.) 208, where executors covenanted to warrant "to the extent of their assets," it was held that the covenant imposed no obligation on them individually, nor beyond the assets in their hands at the time of the eviction, and the previous case of Nicholas *v.* Jones, 3 A. K. Marsh. (Ky.) 385, had been to the same effect ; and in such cases there will be no estoppel as to any individual right or estate which the fiduciary vendor may have ; Wright *v.* De Groff, 14 Mich. 168. This principle was carried beyond former cases in Glenn *v.* Allison, 58 Md. 527, where the court denied the personal liability of a trustee upon his full covenants for title in a mortgage which recited the authority to borrow money conferred on the trustee by the deed of trust, holding that under such circumstances it was but fair to presume the money was loaned on the faith of the trust estate, and not upon the covenants of the mortgagor.

The distinction between these two classes of cases may perhaps be, that, as every restriction of liability implied in the fiduciary character of the vendor is negatived by the insertion of full vendors' covenants, the purchaser is entitled to rely on these covenants unless their force is restrained either expressly or by necessary implication arising outside the capacity in which the covenantor conveys. A covenant by a part owner, to the extent of his share, obviously binds him no further than to that extent ; Coster *v.* Manufacturing Co., 1 Green's Ch. (N. J.) 467 ; and it is done every day by tenants in common. See *supra*, § 25.

demanded from them,[1] nor can they be implied from any words of grant or leasing.[2] Nor of course can any covenants be required from the sovereign power, whether represented by the Crown[3] or the Commonwealth.[4]

[1] The Monte Allegre, 9 Wheat. (S. C. U. S.) 616; Rocksell *v.* Allen, 3 McLean, (C. C. U. S.) 357; Corbitt *v.* Dawkins, 54 Ala. 282; Loudon *v.* Robertson, 5 Blackf. (Ind.) 276; Stephen *v.* Ells, 65 Mo. 456; Friedly *v.* Scheetz, 9 Serg. & Rawle, (Pa.) 156; Rogers *v.* Horn, 6 Rich. (S. C.) 361; Mitchell *v.* Pinckney, 13 S. Car. 203. In Gibson *v.* Mussey, 11 Verm. 212, and Wilson *v.* Cochran, 14 N. H. 397, where a tax collector had, in pursuance of a statutory form for deeds to be executed by such officers, entered into personal covenants for the title, it was held that they were not binding on him, he having been obliged to follow the statutory precedent. For a reference to such statutory precedents, see Stimson's Amer. Statute Law, § 1489 *et seq.*

[2] Dow *v.* Lewis, 4 Gray, (Mass.) 473; *supra*, p. 44, n. 1.

[3] Dart on Vend. (5th ed.) 552.

[4] State *v.* Crutchfield, 3 Head, (Tenn.) 113. It has, however, been held that where the Commonwealth has conveyed to an alien, with covenants of warranty, she will be estopped to set up the alienage as ground of escheat. Commonwealth *v.* Andre, 3 Pick. (Mass.) 224. See *infra*, Ch. XI.

CHAPTER III.

THE COVENANT FOR SEISIN.[1]

§ 38. From an early day title was defined to be the means whereby the owner of land has the just possession of his property;[2] and in order that this should be complete, there was required *juris et seisinæ conjunctio*.[3] It was a favorite object of the common law — long before the Conquest — that possession of land and its transfer should be open and notorious, and the livery of seisin, which was the mode of transfer long before the introduction of deeds, was made in the presence of witnesses. And when later, though still in Saxon times, deeds came into use, these were the mere authentication of the transaction.[4] When, with the Conquest, came the feudal system, this seisin denoted the completion of that investiture by which the vassal was admitted to the fief, and without it no freehold could be constituted or pass.[5]

In this sense seisin was synonymous with possession, and was usually termed seisin in deed or actual seisin. There was also a virtual or constructive seisin, such as that of the possession of a tenant for years, which was deemed to be also the possession

[1] For the form of the covenant, see *supra*, p. 23, n. 3, and p. 28, n. 3. It has already been seen, *supra*, Ch. II., that in England since the introduction of the practice in conveyancing of "dower uses" the covenant for seisin has dropped out of use and has been superseded by the covenant for good right to convey. Two of the latest cases in the reports in which the covenant for seisin is found are Giles *v.* Roe, 2 Dickens, 570, in Lord Thurlow's time, and Howell *v.* Richards, 11 East, 641 (A. D. 1809).

[2] Co. Litt. 345 *b*; 2 Black. Com. 195.

[3] It was also called *jus duplicatum* or *droit droit*. Co. Litt. 266.

[4] It is familiar that after their coming into use it was the custom to transact all conveyances at the county court and enter a memorial of them in the leger book of some adjacent monastery, and these gradually became the depositaries of the charters or title deeds of the great landed proprietors. All such deeds as could be found were destroyed by William the Conqueror, as part of his policy that all titles should commence from himself.

[5] Butler's note to Co. Litt. 366 *b*; Taylor *v.* Horde, 1 Bur. 107. To this there was a single exception, the case of a fine, the reasons for which are clearly stated in 1 Cruise on Fines and Recoveries, 1. See also the Book of Fines, printed by the Record Commissioners in 1835.

of the owner of the reversion. Then too there was a seisin in law, as where after a descent the heir, who had the right of possession though he might not have actually entered, yet was deemed, for some purposes at least, seised of the estate of his ancestor.[1]

§ 39. It has been already said that warranty, which was the covenant for title of those days, partook in its origin of the simplicity of the early common law,[2] and was intended to assure *the title*, in its strict definition; that is, the union of the right and the possession — the *jus* and the *seisina*.[3]

§ 40. With the passage of the statute of Uses came those conveyances which taking effect under it rendered the livery of seisin no longer necessary, and in the course of the change from the ancient to the modern system of law which was going on during the century and a half which elapsed between the end of Henry the Eighth's reign and the restoration of Charles, the word "seisin" seems gradually to have been looked upon less as one of the elements of title than as synonymous with title itself, and the covenant that one was seised in fee was, in the reports of that time, regarded as a covenant for *the title*,[4] in contradistinction to the covenant for quiet enjoyment, which was called a covenant to assure *the possession*;[5] and such a construction, though denied, as will be seen, in parts of this country, has been preserved in England to the present day.[6] In this sense, therefore, the cove-

[1] At this day, the old doctrine of seisin and disseisin, which bears the reputation of being "one of the most obscure and difficult in the law" (1 Cruise on Real Property, 14), has lost much of its practical importance. It is sufficient here to notice that in Taylor *v.* Horde, 1 Burrow, 60, the principles of the common law were ably shown by Mr. Knowler to be that a wrongful possession by a stranger and feoffment by him passed to the feoffee an actual immediate estate of freehold with all its rights and incidents, defeasible only by the lawful owner, whose right of entry, however, was taken away by a descent cast on the heir of the feoffee. Lord Mansfield, however, held that mere acts of intrusion or trespass, followed by a feoffment, could not thus turn the lawful owner into a disseisee, unless he should elect to consider himself disseised; and this doctrine has been since generally adopted in the English cases (Jerritt *v.* Weare, 3 Price, 575; Goodright *v.* Forester, 1 Taunt. 578; Doe *v.* Lynes, 3 Barn. & Cress. 388), notwithstanding the earnest stand made against it by Mr. Preston and Mr. Butler; Preston on Abstracts, 279; Butler's note to Co. Litt. 330 *b*. In America, the cases which are collected in the Digests under the head of "Seisin and Disseisin," have reference almost exclusively to what constitutes an adverse possession under the limitation acts, as to which the cases are classified in the note to Taylor *v.* Horde in Smith's Leading Cases.

[2] See *supra*, § 8.

[3] See *supra*, § 12.

[4] Cooke *v.* Fowns, 1 Keble, 95.

[5] Gregory *v.* Mayo, 3 Keble, 745, 755.

[6] Howell *v.* Richards, 11 East, 641; Young *v.* Raincock, 7 Com. Bench, 310.

nant for seisin is synonymous with the covenant of good right to convey.[1]

§ 41. But as has been seen, the form in which the covenants for title are expressed is one of the marked distinctions between conveyances on the different sides of the Atlantic, and the covenant for seisin is, in most of the United States, briefly expressed by the words that the grantor "is lawfully seised," or "has a good and sufficient seisin," or words to that effect.[2] And at the time when these covenants were originally introduced, owing to the sense in which the word "seisin" was used, as synonymous with title, a covenant expressed in this short form had, in England, the same practical import as the longer form which succeeded it, and a covenant that one was seised, or lawfully seised, meant seised of an indefeasible estate; in other words, it was a covenant for the *title*, in its technical sense.[3]

§ 42. But for more than half a century a different and peculiar construction has been given to this covenant in a few of the United States, in which it is considered that a covenant that one is "lawfully seised," or has "a good and sufficient seisin," does not require that the grantor should have an indefeasible estate, and is not broken if an actual seisin, no matter how tortious provided it be under color of title, is given to the purchaser.[4]

This doctrine seems to have been first announced in Marston *v.* Hobbs, decided in Massachusetts in 1817, where it was said: "The defendant, to maintain the issues on his part, was obliged to prove his seisin when the deed was executed. But it was not necessary to show a seisin under an indefeasible title. A seisin in fact was sufficient, whether he gained it by his own disseisin or whether he

[1] Browning *v.* Wright, 2 Bos. & Pull. 13. They are, however, far from being synonymous covenants in all respects; as although a covenant for seisin as expressed above implies a right to convey (Nervin *v.* Munns, 3 Lev. 46), yet the converse of this will by no means hold, the instances being numerous in which one has a good right to convey, though not seised of the estate which would pass by the deed. See *infra*, Ch. IV.

[2] *Supra*, § 21, n. 3.

[3] Cooke *v.* Fowns, 1 Keble, 95; Gray *v.* Briscoe, Noy, 142; the word "not" in the report of this last case is an evident typographical error.

[4] The possession of a mere trespasser, avowed to be such, will not of course be sufficient. Thus in Wheeler *v.* Hatch, 12 Me. 389, where the grantor was, as to one lot, in actual possession though without claiming title, it was held by the Supreme Court of Maine (which has adopted the doctrine referred to in the text) that the covenant was broken.

was in under a disseisor. If at the time he executed the deed he had the exclusive possession of the premises, claiming the same in fee simple by a title adverse to the owner, he was seised in fee, and had a right to convey. If the defendant's grantor had no authority to convey the premises to the defendant, yet if, in fact, he entered under color, though not by virtue of that deed, and acquired a seisin by disseisin, by ousting the former owner, he has not broken these covenants." [1]

In the next year, the same court applied this doctrine under a covenant apparently similarly worded, by deciding that a covenant for seisin was not broken where the grantor had, some years before the execution of the deed, entered upon the lands claiming to hold them by a grant from the Commonwealth, which possession he had transmitted to the plaintiff, his grantee; [2] and the construction thus given has been adhered to in Massachusetts, recognized and adopted in Maine and in a qualified sense in Ohio,[3]

[1] 2 Mass. 439, Parsons, C. J. There appears to have been no argument on this point, which was decided almost incidentally.

[2] Bearce *v.* Jackson, 4 Mass. 408. "As to the other exception," said Parsons, C. J., "it is very clear that the defendant's intestate, being in possession, claiming a fee simple in the land, was able to convey. So the covenant of seisin was not broken."

[3] Griffin *v.* Fairbrother, 1 Fairf. (Me.) 91; Cushman *v.* Blanchard, 2 Greenl. (Me.) 268, 269; Wheeler *v.* Hatch, 3 id. 389; Boothby *v.* Hathaway, 20 Me. 255; Baxter *v.* Bradbury, id. 260; Wilson *v.* Widenham, 51 id. 567; Montgomery *v.* Reed, 69 id. 510; Chapel *v.* Bull, 17 Mass. 219; Wait *v.* Maxwell, 5 Pick. (Mass.) 217; Cornell *v.* Jackson, 3 Cush. (Mass.) 509; Raymond *v.* Raymond, 10 id. 134; Follett *v.* Grant, 5 Allen, (Mass.) 175; Kirkendall *v.* Mitchell, 3 McLean, (C. C. U. S.) 145, *dictum* by McLean, J.; Backus *v.* McCoy, 3 Ohio, 211. "The covenant so usual in our deeds," said the court in Raymond *v.* Raymond, *supra*, "that the grantor is 'seised of the premises, and that he has good right to sell and convey the same,' have long since had a judicial construction in this Commonwealth. These covenants do not express or imply a warranty of any absolute title; they relate to the actual seisin of the grantor, and that he has such possession of the premises as that he may execute a deed thereof." And see Crocker on Common Forms (2d ed.), 60.

The doctrine in Ohio differs in some respects from these cases. In Backus *v.* McCoy, *supra*, Sherman, J., in delivering the opinion of the court, after referring to the decision in Marston *v.* Hobbs, said: "This decision appears to us to be founded on sound and correct principles. If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seisin is not broken [until the purchaser or those claiming under him are evicted by title paramount]. He has a seisin in deed, as contradistinguished from a seisin in law, sufficient to protect him from liability, under his covenant [as long as those claiming under him may continue so seised]. Actual disseisin, or the actual adverse possession of the lands of another, is the commencement of a right, which by lapse of time may ripen into a perfect title in the disseisor or possessor; and during the time that the

and somewhat recently approved in Illinois [1] and Nebraska.[2] Where, however, the covenant is expressed by the words "seised of an *indefeasible* estate," it of course receives the same construction everywhere.[3]

grantee of such disseisor remains in the undisturbed possession of the lands by reason of the conveyance of such disseisor, he cannot maintain an action upon the covenant of seisin. No breach of such covenant will have taken place if the grantor was seised in deed at the time of the conveyance, however that seisin may have been acquired. If the grantor, at the time of executing this conveyance, was in possession of the land, either as disseisor, or under color of title, it cannot be said that he was not seised of an estate in the premises." This doctrine was subsequently affirmed in Foote *v.* Burnet, 10 Ohio, 327, and Devore *v.* Sunderland, 17 id. 60, and in Stambaugh *v.* Smith, 23 Ohio, 588, was declared to have become a rule of property in that State. Great Western Stock Co. *v.* Saas, 24 id. 543.

The parts in the above quotation marked within brackets draw a distinction which is not recognized by the cases referred to in the text. Marston *v.* Hobbs and the cases which follow it decide that if there be an actual seisin the covenant is not broken *at all*, that there has been and can be no breach, and that the covenant will have been fully answered even though the purchaser should be afterwards evicted. But Backus *v.* McCoy and the cases which follow it decide that where there is an actual seisin the covenant is not broken *at that time;* it remains unbroken so long as the grantee or those claiming under him continue seised, and the breach is postponed until their seisin be disturbed, either actually or constructively. This course of reasoning is intended to give to the heir, the devisee, or the assignee of the covenantee, a right of action in his own name where the actual seisin has been transferred to him — a result to which the cases above cited refuse their concurrence, as they hold that the covenant for seisin is broken, if at all, the instant it is made, becoming thereby a right of action and incapable of transmission by descent or assignment See Ch. VIII.

The class of cases thus referred to must be distinguished from that class to which belong Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120; Fowler *v.* Poling, 2 Barb. (N. Y.) 300; Slater *v.* Rawson, 6 Met. (Mass.) 439, &c.; which decide that a seisin in fact is a sufficient estate to carry with it to an assignee the covenants for quiet enjoyment and of warranty; see *infra*, Ch. X. It does not necessarily follow, however, that such a seisin will support a covenant for seisin. In Coit *v.* McReynolds, 2 Rob. (N. Y.) 658, the court, while considering itself unable to understand what is meant by seisin in fact as distinguished from a seisin in law, yet deemed the case of Fowler *v.* Poling, *supra*, to be an authority that a mere defeasible title will not work a breach of the covenant for seisin.

[1] Watts *v.* Parker, 27 Ill. 229. The court was "inclined to think the doctrine held by the Supreme Court of Massachusetts to be quite as applicable to our condition and to the exigencies of our State as any other, and to adopt it as a sound doctrine." The facts, however, showed that the title, as was said by the court, had ripened by twenty-six years' possession into an indefeasible one (as to which see *infra*, § 43). The case itself was correctly decided, as the action was not covenant brought by the purchaser, but the breach of the covenant was set up by the latter as a defence to payment of the purchase money; as to which see *infra*, Ch. XIV.

[2] Scott *v.* Twiss, 4 Neb. 133.

[3] The distinction thus arising from the form of the covenant was noticed in Prescott *v.* Trueman, 4 Mass. 631; Smith *v.* Strong, 14 Pick. (Mass.) 132; Raymond *v.* Raymond, 10 Cush. (Mass.) 134; Collier *v.* Gamble, 10 Mo. 472; Abbott *v.* Allen, 14 Johns. (N. Y.) 252; Garfield *v.* Williams, 2 Verm. 328; Pierce *v.* Johnson,

§ 43. There is one point of view from which the construction thus given to this covenant might appear to be correct. Since possession enduring for a sufficient length of time will, under the limitation acts, ripen into a good title, there would seem reason for holding that such possession should be regarded as an actual estate from the moment of its commencement, and therefore that the "seisin" which this covenant purports to assure might properly be used in its old signification, and not, as has been more recently the case, as synonymous with title.[1]

But some of these same cases which decide that a possession under color of title is sufficient to support a covenant for seisin as expressed above, take no distinction between such a covenant and the covenant of good right to convey. Independently of the statutes of champerty,[2] the latter covenant has no connection whatever with the possession; it refers, as its language indicates, merely to the right.[3] But in an early case in Massachusetts,[4] it was held that one who claiming to be seised had covenanted that he had "full power, good right, and lawful authority to sell," was a competent witness for his grantee in

4 id. 247. "The doctrine established in some of the neighboring States," said the court in Pierce *v.* Johnson, "that the covenant of seisin is satisfied by a possession without title, cannot well be reconciled to sound reason, except when applied to the naked covenant of seisin without any words that imply any other right but mere possession."

Professor Dane drew the distinction somewhat further than is supported by the authorities. "If," said he, "the grantor covenant he is seised in fee, and the issue be thereon, and he proves seisin in fact even by disseisin, he maintains the issue; but if he covenant he 'is lawfully seised in fee,' and the issue be thereon, it is essential, to maintain the issue, he prove he was lawfully seised; and if seised only by disseisin and wrong, the jury cannot, on this issue, find he was lawfully seised." 4 Dane's Ab. 339. The cases, however, do not draw the distinction between "seised" and "lawfully seised." In most of those cited, the covenant was that the grantor was lawfully seised, the two expressions being treated as synonymous. But the distinction is taken between these expressions and "*indefeasibly* seised."

[1] Thus in Wheeler *v.* Hatch, 3 Fairf. (Me.) 389, Thomas *v.* Perry, Pet. (C. C. U. S.) 49, and Wilson *v.* Forbes, 2 Dev. (N. C.) 35, it was held that the covenant for seisin was broken by an adverse possession under color of title. In the first of these cases there were two lots, as to one of which the grantor was in possession, though without claiming title, and as to the other there was an adverse possession under color of title, and it was held that the covenant was broken as to both. So in Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 436, it was held that a covenant that the grantor had good right to convey could not be construed as a covenant for seisin, because it was notorious at the time of conveyance that there was an adverse possession.

[2] The connection of this subject with the champerty acts is noticed *infra*, § 47 *et seq.*

[3] See *infra*, Ch. IV.

[4] Twambly *v.* Henley, 4 Mass. 441.

an action against him under the paramount title, "as there was no covenant that the grantee should have a good title." So, soon after,[1] it was said "the covenant for seisin is not broken, for it was admitted that the grantor was seised; neither is the covenant of a right to convey broken, for a man seised has a right to convey."[2] So in a later case,[3] where the covenants were those of good right to convey and of warranty, it was said by the court that "the covenants of seisin and of right to convey are, to all practical purposes, synonymous covenants; the same fact, namely, the seisin in fact of the grantor claiming the right to the premises, will authorize both covenants, and the want of it is a breach of both." And still later it was said, "The covenant of a right to convey is synonymous with the covenant for seisin. The actual seisin of the grantor will support both of these covenants, irrespective of his having a good indefeasible title."[4] Again, where in a case in New Hampshire[5] the defendant had covenanted that he was the lawful owner of the land, and was seised and possessed thereof in his own right in fee simple, and had full power and lawful authority to grant and convey the same, it was said that "each of these amounts only to a stipulation that the grantor has such a seisin that the land will pass by his deed."[6]

§ 44. While the doctrine that the covenant for seisin is not broken if the vendor has an actual seisin at the time of the exe-

[1] Prescott *v.* Trueman, 4 Mass. 631.

[2] The same expression was used in Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 429, but the word "seisin" was there used as synonymous with title, in its old sense. "A complete legal title," said the court, "is the *juris et seisinæ conjunctio*, the title and possession united. This is the technical and legal import of the terms 'seised of the legal title.' 'Seisin' means *ex vi termini* the whole legal title. A covenant of seisin is broken if the covenantor have not the possession, the right of possession, and the right, or legal title. It would, therefore, be difficult to imagine a case in which a party could be seised and yet not have the right to sell and convey the legal title. Seisin is a *nomen generalissimum* which includes the right to sell: *Omne majus continet in se minus.*" Although it may perhaps be doubted whether the signification thus given to the word "seisin" is not rather larger than the old law gave to it (else the words *jus* and *seisina* would not have been distinguished as *together* making a perfect title, see § 38), yet as applied to the covenant for seisin the definition is certainly supported by all the authorities except those now under consideration. See *infra*, p. 59.

[3] Slater *v.* Rawson, 1 Met. (Mass.) 450, 456.

[4] Raymond *v.* Raymond, 10 Cush. (Mass.) 134.

[5] Willard *v.* Twitchell, 1 N. H. 178, where it was said, "It is deeply to be regretted that it has been so settled;" Breck *v.* Young, 11 id. 491; but in Parker *v.* Brown, 15 id. 176, these cases have been overruled and the doctrine rejected; see *infra*, p. 59, n. 3.

[6] See *infra*, § 47 *et seq.*, for an explanation of these cases.

cution of the deed seems to be confined to the States already mentioned, it has been strongly denied in others. From an early day an opposite doctrine was announced in Vermont, and has since been consistently adhered to.[1] In Connecticut, the Massachusetts decisions have been commented on with severity and their reason denied,[2] and in a somewhat early case in New Hampshire, the Supreme Court, after an able argument in opposition to the doctrine of actual seisin, repudiated it altogether,[3] over-

[1] In the early case of Catlin *v.* Hurlburt, 3 Verm. 407, it was said, per Hutchinson, C. J., delivering the opinion: "The present covenant declared upon is that the grantors were well seised of the same land in fee simple, and had in themselves good right to bargain and sell the same in the manner in said deed mentioned. These expressions, and those of similar import, have always been considered in this State as amounting to a covenant of title. They have been inserted that they should be so considered. It is argued, however, that this means nothing more than that the grantors were in possession, claiming to hold in fee simple. This alteration might as well be incorporated by construction into all the covenants that decidedly relate to title in the whole deed. That they were well seised in fee simple, means that they were actually in possession, claiming to hold in fee simple. That they had good right to sell and convey, means that they claim to have such right. That the premises are free from all incumbrances, means that they claim that they are thus free. This is not the most natural and obvious meaning of the usual expressions in deeds of warranty. They say nothing about claiming. They speak of realities. Fee simple denotes a permanent estate. Well seised in fee simple denotes a seisin of a permanent estate. Such would be the most natural construction, without the aid of concurrent circumstances. But when we recollect that this deed was made and executed at a time and place when and where such expressions were universally understood to relate to title, it would do injustice should we give to them a different construction." This decision has been always adhered to. Richardson *v.* Dorr, 5 id. 21; Mills *v.* Catlin, 22 id. 106.

[2] Lockwood *v.* Sturdevant, 6 Conn. 385, where Hosmer, C. J., who delivered the opinion of the court, after considering that the cases of Marston *v.* Hobbs, &c., were inapplicable, said: "I cannot yield to them my assent. . . . Although the covenantor should have had the actual possession of the premises, and an ideal or imaginary right, founded on a supposed title that was merely colorable, *yet this is not a legal seisin in fee;* and nothing short of this will support a covenant that the grantor is seised in fee simple, because nothing short of this proves the covenant to have been true. A seisin in fact of an estate in fee simple, if the word "seisin" intends anything more than possession, is an expression without meaning where there is no seisin in law. In the nature of things, there is but one species of seisin in fee, and that necessarily is the possession of an estate conveyed, with such a legal interest as the fee simple denotes." The covenant, however, in this case was for an *indefeasible* estate — an expression which admits of but one construction. The case, therefore, did not call for the above remarks, as was indeed admitted. In the recent case of Comstock *v.* Comstock, 23 Conn. 349, it was held that the covenant was broken if the covenantor was seised as tenant in tail only.

[3] Parker *v.* Brown, 15 N. H. 186. "Consideration has satisfied us," said Parker, C. J., who delivered the opinion, "that the fair import of the covenant of seisin extends beyond a mere engagement that the party is seised of the land by a seisin which would be good only against another having no pretence of title. After contracting that they are the lawful owners of the premises, the grantors covenant that they are lawfully seised in their own

ruling the previous decisions in that State,[1] which had, almost involuntarily, followed the train of authority in Massachusetts; "and these latter decisions," it has been said by high authority, "contain, it is apprehended, the true rule of the common law,"[2] and are certainly supported by the weight of authority.[3]

§ 45. In this apparent conflict of opinion, it is natural to refer to the probable reasons which have led to the adoption of the doctrine thus advocated and denied. Its origin has at times been doubted. It has been suggested that "the rule seems in some measure to have grown out of the hardship, real or apparent, of permitting a grantee to recover back the consideration money and interest, while he or his assignee is enjoying a possession that by lapse of time may ripen into a perfect title."[4]

But if the doctrine of actual seisin arose from this source, courts have been forced to go further than such exigencies required. For if the covenant be fully answered by the transfer of an actual, though a tortious seisin, the subsequent disturbance of the purchaser can logically give him no rights under that covenant, as its purpose was accomplished by the transfer of the actual seisin; and it seems to be admitted by some of the cases that such must be the necessary consequence.[5]

right in fee simple. This engagement is certainly not satisfied in any just sense by evidence that the grantors are unlawfully seised, without right, in their own wrong, or of no fee simple except such as is claimed wrongfully and in disseisin of the true owner. This may be a good seisin against all but the true owner, but is not a seisin in the parties' own right in fee. The grantee who takes such a covenant for his security has a right to understand that his grantor transmits to him some seisin other than one which will make him liable to the rightful action of a third person, the moment he enters under his deed."

[1] Willard *v.* Twitchell, 1 N. H. 178; Breck *v.* Young, 11 id. 491; *supra*, § 43, n. 5.

[2] 4 Kent's Com. 472.

[3] Martin *v.* Baker, 5 Blackf. (Ind.) 232; Brandt *v.* Foster, 5 Clarke, (Io.) 287; Zent *v.* Picken, 54 Io. 535; Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 430; see the remarks on the last case, cited *supra*, p. 58, n. 2; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1; Morris *v.* Phelps, 5 id. 49; Abbott *v.* Allen, 14 id. 248; Fitch *v.* Baldwin, 17 id. 161; McCarty *v.* Leggett, 3 Hill, (N. Y.) 134; Mott *v.* Palmer, 1 Comst. (N. Y.) 564; Coit *v.* McReynolds, 2 Rob. (N. Y.) 655, noticed *infra*, p. 75, n. 4; Pringle *v.* Witten, 1 Bay, (S. C.) 256; Woods *v.* North, 6 Humph. (Tenn.) 309; Kincaid *v.* Brittain, 5 Sneed, (Tenn.) 119; Recohs *v.* Younglove, 8 Bax. (Tenn.) 385; Hastings *v.* Webber, 2 Verm. 407; Thomas *v.* Perry, Pet. (C. C. U. S.) 57; Pollard *v.* Dwight, 4 Cranch, (S. C. U. S.) 430.

In England, such has always been the case. Gray *v.* Briscoe, Noy, 142; Howell *v.* Richards, 11 East, 641; Young *v.* Raincock, 7 Com. Bench, 310.

[4] Wilcox's note to Foote *v.* Burnet, 10 Ohio, 327.

[5] In Cushman *v.* Blanchard, 2 Greenl. (Me.) 266, it was said (per Mellen, C. J.), "If the grantor was seised in fact, though not of an indefeasible estate, and the grantee enters under his deed, then the

And it will be hereafter seen, in considering the question of the measure of damages upon a breach of this covenant,[1] that a grantee is *not* entitled as a matter of course to recover back the consideration money and still retain the land for which it is thus deemed an equivalent.[2] Every endeavor is made, while securing to the purchaser the full benefit of his covenant, to protect the vendor from losing both the land and its price; and it is sought, so far as is practicable, to give to the recovery of the consideration money, in an action on the covenant for seisin, the effect of revesting in the covenantor the title, such as it is, which he has conveyed.

§ 46. It is believed that a more satisfactory reason exists. It has already been said that the doctrine might well be accounted for on the ground of seisin being used as synonymous with possession,[3] were it not that the same construction has, in some cases, been applied to the covenant for good right to convey, which would appear to have no connection with the *possession*, but to be confined exclusively to the *right;* the reason is, therefore, inapplicable to the latter covenant.

§ 47. The foundation of the doctrine must therefore be sought from another quarter, and it is believed to have sprung from the doctrine of adverse possession as connected with the champerty acts. Reference has already been made to the importance which the common law in the days of its simplicity attached to the notoriety of transfer of possession,[4] and how, some centuries after the Conquest, this was evaded by the practice of lands being held to uses; it was secretly held and secretly conveyed, so that (so ran the preamble to the statute of Uses)[5] "Scantly any person could be certainly assured of any lands by them purchased, nor know surely against whom they should use their actions or executions for their rights, titles, and duties . . . to the utter subversion of the ancient common laws of this realm."

In the same year were passed both the statute of Uses and the

covenant of seisin is not broken; but the grantee may be evicted by elder and better title, and then the covenant to warrant and defend is broken, *and no other*." So in Cornell *v.* Jackson, 3 Cush. (Mass.) 509, the court said, "A paramount title does not affect a covenant for seisin."

[1] *Infra*, Ch. IX.

[2] Thus if the purchaser has bought in the paramount title, his damages are limited to the amount thus paid by him. See *infra*, Ch. IX.

[3] See *supra*, § 43.

[4] See *supra*, § 38.

[5] 27 Hen. VIII. c. 10, A. D. 1535.

statute, still technically in force but practically of no effect whatever, "For Inrollment of Bargains and Sales."[1] Five years later came the act commonly known as the "Pretended Title Act,"[2] which further marked the design of the legislature to preserve the transfer of the possession as an ingredient of title, by prohibiting the bargain, sale, or transfer of any premises of which the party had not been in possession or received the rents or profits for a year previously, under the penalty (imposed both upon the seller and the purchaser, if he purchased knowingly) of the forfeiture of the value of the premises. "This statute," said Montague, C. J.,[3] "has not altered the common law, for the common law before the statute was, that he who was out of possession ought not to bargain, grant, or let his title, and if he had done so, it would have been void; then the statute was made in affirmation of the common law, and not in alteration of it; and all that the

[1] 27 Hen. VIII. c. 16. The statute of Inrollments was limited to deeds of bargain and sale of estates of *inheritance* or *freehold*, and the device was soon introduced of a bargain and sale for a *term of years* followed by a release of the reversion, which effectually evaded the statute. "It was evidently," says Reeves, "a principal object of the makers of that act (the statute of Uses), that land should thenceforward be transferred, as anciently, by feoffment with livery of seisin and by other common law assurances, whereby the notoriety of the alienation might add stability and quiet to every man's possession and right; but it is remarkable that this very statute on the contrary contributed in the end to bring feoffments into entire disuse, and gave rise to a secret mode of conveying land pregnant with all the inconveniences and mischiefs before complained of. They reasoned in this manner: if he who is seised of the use becomes by the force of the statute seised of the land, then to give the use is in effect to give the land; and the facility and privacy with which this may be transacted renders it a desirable way of effecting that purpose. Upon this principle, the conveyances before in practice were continued, legitimated as they now were by the operation of the statute upon them, and others were soon invented of the like nature. A conveyance to uses became on many accounts the commonest and perhaps the surest mode of transferring land. These conveyances have continued in practice ever since, and to give effect to them is now one of the principal operations of the statute. The Parliament soon saw that this would be the consequence of the statute, in one instance; for if the statute executed every use that was raised, a person who wanted to part with his land had nothing to do but to raise a use by *bargain and sale*, as was then commonly practised, and the statute would confirm the *cestui que use* in the seisin of the land as fully as if there had been a transmutation of possession by feoffment, fine, or recovery. To prevent the mischief of this in some degree, it was enacted by statute 27 Hen. VIII. c. 16, that no bargain and sale should enure to pass a freehold, unless the same be made by *indenture*, and be enrolled within six months in one of the courts at Westminster, or with the *custos rotulorum* of the county; after which provision, it was thought the conveyance of a use would be as notorious as the ancient common law assurances." 3 Reeves's History of the Common Law (Finlason's ed.), 384.

[2] 32 Hen. VIII. c. 9, § 2, A. D. 1540.

[3] Partridge *v.* Strange, Plowd. 88.

statute has done is, it has added a greater penalty to that which was void by the common law before." [1]

This passage referred, of course, to the mode of conveyancing introduced by the statute of Uses. For although the common law had long before declared that the transfer of a right of entry or a right of action was void, "lest there should be maintenance and stirring up of suits," [2] and the same doctrine was applied, as part of the common law, to the transfer, through the medium of the statute of Uses, of real estate of which the possession was not transferred with the right,[3] yet before that statute there could scarcely be such a thing as a transfer of land then held in adverse possession.[4]

[1] "It is a mistake to suppose," said Duer, J., delivering the opinion of the court in Hoyt *v.* Thompson, 3 Sandf. (N. Y.) 430, "that the [old] law of champerty is derived from the provisions of the statute, which we have re-enacted, which forbids the conveyance or sale of lands by a party out of possession. The statutory prohibition is not only a partial affirmance of a general rule of the common law. The common law forbids every transfer of a disputed title or right, whether relating to real or personal estate, by a person out of possession; and it is manifest that the reasons of public policy upon which the interdiction is founded apply with equal force to every description of property." The doctrine here referred to is ably examined in the notes to Row *v.* Dawson, 3 Leading Cases in Equity.

[2] Co. Litt. 214 *a*; Lampet's case, 10 Rep. 48.

[3] By the act of 8 & 9 Vict. c. 106, § 6, a contingent, executory, and future interest, and a possibility coupled with an interest in land, also a right of entry, whether immediate or future, vested or contingent, may be disposed of by deed, provided it do not defeat or enlarge an estate tail. As to the construction of this statute, and its effect upon that of 32 Hen. VIII., see Jenkins *v.* Jones, L. R. 9 Q. B. Div. 128; Kennedy *v.* Lyell, 15 id. 491.

[4] "Where land was conveyed by feoffment — the only mode known to the earlier law — the difficulty with regard to possession could not arise; for in order that the livery of seisin should be effectual it was necessary in general for the feoffor to have actual possession at the time of livery made. For this purpose, a claim by him and his presence upon the land, if with present right to possess it, were not sufficient; but it was requisite that the party previously possessed and all persons holding for him should either be expelled from every part of the premises, or that he should virtually surrender possession by giving his consent to the feoffment." Judge Hare's note to Duchess of Kingston's case, 2 Smith's Lead. Cas. In the last American edition of this book, the editor has thus altered the expression of the passage: "The distinction between the mere principle that a thing not possessed cannot be granted, and the offence of maintenance, is the more evident from the course of equity, which looked upon actual maintenance in the same light as the common law; Stephen *v.* Bagwell, 15 Ves. 139; and yet gave effect to the transfer of future and contingent estates and interests. It consequently appears that the conveyance of estates not vested in interest was void at law, not as amounting to maintenance, for had that been the case no relief could have been afforded in equity, but under the operation of a general rule of policy, which forbade the transfer of any right not sustained and accompanied by possession, in order to avoid giving occasion to maintenance. Co. Litt. 214; Bacon's Abr. tit.

§ 48. When, however, the mode of assurance was altered, and land could be transferred without notorious change of possession, the application of the remarks of Montague becomes obvious. Whatever may have been the intention of the legislature in passing the Pretended Title Act, it is certain that it was judicially looked upon as scarcely altering the law as it stood at that time, and that the offence of maintenance consisted not so much in taking a conveyance of the whole or part of a thing not vested in the party by whom it was made, as in taking it in consideration of assisting or maintaining a suit for its recovery.[1] Such has been the course of decision in England down to the present day,[2] and it is there well settled that where the transfer is not made for the purpose of assisting or maintaining a suit the mere fact of an adverse possession will not invalidate the conveyance.[3]

§ 49. In many parts of this country, however, the doctrine has received a wider application. In some of the States, the statute of Henry VIII. was re-enacted literally, in some it was modified,[4]

Grant, D ; Bayler *v.* Commonwealth, 40 Pa. 37, 42. As the rule was founded on the want of possession, it did not apply where the grantor was seised, although without right, through the expulsion of the rightful owner. Hence arose the difference between the operation of a feoffment and of a grant ; because a feoffment was another name for livery of seisin, and livery could not be made unless the feoffor was actually seised. Knox *v.* Jenks, 7 Mass. 488. Such a possession could not be acquired by an entry on land held adversely by another, unless he and all persons holding under him were expelled from the premises, or gave their consent to the feoffment. Litt. § 781 ; Co. Litt. 48 *b*. As, therefore, a feoffment could not be made without obtaining actual possession, a previous want of possession formed no obstacle to its operation." 2 Smith's Lead. Cas. (8th Am. ed.).

[1] Note to Duchess of Kingston's case, *supra*, p. 63, n. 4.

[2] Stanley *v.* Jones, 7 Bing. 369 ; Doe *v.* Evans, 1 Com. Bench, 717 ; Hitchins *v.* Lander, Cooper's Ch. Cas. 34 ; Sharp *v.* Carter, 3 P. Wms. 375 ; Prosser *v.* Edmonds, 1 Younge & Col. (Exch.) 481 ; Harrington *v.* Long, 2 Myl. & Keen, 590 ; Anson *v.* Lee, 4 Simons, 364; Hunter *v.* Daniel, 4 Hare, 420 ; Wilson *v.* Short, 6 id. 366; Cook *v.* Field, 15 Q. B. 460 ; Cockell *v.* Taylor, 15 Beav. 103 ; Jenkins *v.* Jones, L. R. 9 Q. B. Div. 128 ; Kennedy *v.* Lyell, 15 id. 491.

[3] Doe *v.* Martyn, 8 Barn. & Cress. 497.

[4] See 4 Kent's Com. (14th ed.) 446 ; Sherwood *v.* Waller, 20 Conn. 262 ; Way *v.* Arnold, 18 Ga. 181 ; Newkirk *v.* Cone, 18 Ill. 449 ; Breckenridge *v.* Moore, 3 B. Monr. (Ky.) 629 ; Little *v.* Bishop, 9 id. 247 ; Sherry *v.* Frecking, 4 Duer, (N. Y.) 454 ; Sedgwick *v.* Stanton, 4 Kern. (N. Y.) 289; Chairs *v.* Hobson, 10 Humph. (Tenn.) 355; Bledsoe *v.* Rogers, 3 Sneed, (Tenn.) 466. The doctrine has always been strongly upheld in this State (Tennessee, see *infra*), and the latest statutes (Code of 1884, p. 429, § 2446) have not deviated from it.

In Dakota, the Revised Code (1883, p. 893, § 681) provides that every grant of real property, other than one made by the Territory or under a judicial sale, is void if at the time of the delivery thereof such property is in the actual possession of a person claiming under a title adverse to that of the grantor.

in others the prohibition of champerty was regarded as part of the common law of the State,[1] while in some, whether by statute or common law, it has no existence whatever.[2] In those States, how-

In Vermont, the provision in the Revised Laws (1880, p. 402, § 1953) is in almost the same language.

In New York, the Revised Statutes (1882, p. 2516), following the Pretended Title Act, provide that "no person shall buy or sell, or in any manner procure, or make or take any promise or covenant to convey, any pretended right or title to any lands or tenements, unless the grantor thereof or the person making such promise or covenant shall have been in possession, or he and those by whom he claims shall have been in possession of the same, or of the reversion or remainder thereof, or have taken the rents and profits thereof for the space of one year before such grant, conveyance, sale, promise, or covenant made; and every person violating this provision shall be deemed guilty of a misdemeanor." And in Nichols *v.* Nichols, 5 Hun, 108, it seems to have been held in a case coming within a prior statute on the subject, that the covenant of seisin is merely a covenant of title and does not relate to the possession as it did formerly; and that possession of the land at the time of the conveyance by a third person does not constitute a breach of the covenant, unless such possession is adverse so as to render the deed void for champerty.

[1] Dexter *v.* Nelson, 6 Ala. 69. In Lindsey *v.* Veasy, 62 id. 421, it was decided that a conveyance of land held adversely to the grantor passed no title to the grantee and that the covenant for seisin was broken. Wood *v.* McGuire, 21 Ga. 576; Fite *v.* Doe, 1 Blackf. (Ind.) 127; Martin *v.* Pace, 6 id. 99; Bowman *v.* Wathen, 2 McLean, (C. C. U. S.) 380; Michael *v.* Nutting, 1 Cart. (Ind.) 481; Wellman *v.* Hickson, id. 581; Patterson *v.* Nixon, 79 Ind. 251; but see Elliot *v.* Frakes, 90 id. 389; (it was formerly so in Maine, but has since been altered by statute; Buck *v.* Babcock, 36 Me. 491:) Brinley *v.* Whiting, 5 Pick. (Mass.) 355; Johnson *v.* Prairie, 94 N. Car. 773 (since altered by statute, Code, ch. 256, § 177).

[2] Such as Arkansas, Lytle *v.* The State, 17 Ark. 608 (see in this case an able historical sketch of the statutes of champerty by Scott, J.); Delaware, Bayard *v.* McLane, 3 Harr. 139, where the subject is elaborately considered; Iowa, Wright *v.* Meek, 3 G. Gr. 472; New Hampshire, Hadduck *v.* Wilmarth, 5 N. H. 181; New Jersey, Thomas *v.* Perry, Pet. (C. C. U. S.) 54; Pennsylvania, Stoever *v.* Witman, 6 Binn. 420; Cresson *v.* Miller, 2 Watts, 272; South Carolina, Poyas *v.* Wilkins, 12 Rich. L. R. 428; Texas, Campbell *v.* Everts, 47 Tex. 102; Vermont, Danforth *v.* Streeter, 2 Will. 497; Virginia (the Code following the statute of 8 & 9 Vict. c. 106, § 6, having provided that "any interest in or claim to real estate may be disposed of by deed or will"), Carrington *v.* Goddin, 13 Gratt. 599, and see the former statutes of champerty referred to in Middleton *v.* Arnolds, 13 id. 489; Wisconsin, Noonan *v.* Lee, 2 Black, (S. C. U. S.) 507; and, it is believed, some other States.

The subject is one which has largely been made the subject of local legislation. The latest statutes in force seem to show that in Arizona it is provided (Comp. L. 1877, § 34) that any person claiming title to any real estate may, notwithstanding there may be an adverse possession thereof, sell and convey his interest therein in the same manner and with the same effect as if he was in actual possession thereof, and provisions substantially similar seem now to exist in Arkansas (Mansfield's Dig. 1884, ch. xxvii. § 644); California (Hittel's Codes and St. 1876, vol. i. p. 702, § 6047); Georgia (Rev. Code, 1882, p. 670, § 2695); Illinois (Rev. St. 1883, p. 297, ch. 30); Iowa (Rev. Code, 1884, p. 524, § 1932); Kansas (Comp. L. 1881, p. 211, § 1029); Michigan (Howell's St. 1882, p. 1458, § 5657); Minnesota (Gen. St. 1881, p. 535); Missouri (Rev. St. 1879, p. 110, § 673); Montana (Rev. St. 1879, p. 443, § 210); Nevada (Comp. L. 1873, p. 84, § 262); North Carolina (Code, vol. i. p. 66, § 177); Oregon (Gen. L.

ever, in which, from whatever source, the offence of champerty is forbidden, the effect of such prohibition seems to be that a conveyance by a party out of possession and with an adverse possession against him is void as against the party in possession; in other words, as respects the latter, the grantor has passed no right whatever to his grantee. The mere fact, therefore, of the transfer of real estate of which there is an adverse possession is deemed of itself an offence within the champerty acts.

§ 50. It would seem, therefore, to have been the intention of the courts in which the doctrine of actual seisin prevails, to consider the covenants for seisin and of good right to convey as assurances to the purchaser that there was no such adverse possession of the subject of the purchase as would bring him within the penalties of champerty, and to furnish him with a recompense if such should be the case. If, therefore, an actual seisin were transferred to the purchaser, the vendor had *a right to convey within the spirit of the champerty acts*, and the covenants for seisin and of good right to convey were fully answered. Such at least would appear to be a philosophical reason for the construction which in some States has been given to these covenants.[1]

1874, p. 516); Wisconsin (Rev. St. 1878, p. 632, § 2205); Wyoming (Comp. L. 1876, p. 5, ch. 3, § 7).

[1] Such was the suggestion of Hutchinson, C. J., in Catlin *v.* Hurlburt, 3 Verm. 407. "It is probable," said he, "the covenant for seisin was anciently introduced into deeds to guard against such an adverse possession as would render the deed void, as would have been the case at common law and is now the case by virtue of our statute, if there be an adverse possession." And in Pierce *v.* Johnson, 4 id. 253, the same learned judge observed, "The naked covenant of seisin was probably introduced for the purpose of securing an easy entrance upon the land by the grantee, or to guard against the effect of an adverse possession, which would render the deed void as an instrument of conveyance, and throw the grantee upon his covenants as a remedy." So in Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 436, it was said, "Grayson, without being seised in fact or in law, may according to the law in force at the date of the deed have had lawful right and authority to convey a legal title. The champerty act of 1824 did not take effect until July of that year." So again, the champerty acts are probably referred to by the expression in Phelps *v.* Sawyer, 1 Aik. (Verm.) 157, "Had Sawyer given his deed with a covenant that he was sole owner of the premises and had good right to convey, and the breach had been assigned upon such covenants, the charge would have been correct, for Sawyer could have no right to sell while any person was in possession adverse to him." And in Clarke *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 372, it was said, "It is urged that the statute of 32 Hen. VIII. c. 9, is not in force here, and as it is usual to sell land where the vendor is not in possession, a larger operation should be given to the covenant of warranty here than elsewhere, because the vendee, where he did not obtain actual possession, would otherwise be without remedy. This is a good reason why a purchaser should secure himself by a covenant of seisin or that the vendor has a lawful right to convey, but it is no rea-

§ 51. A question, however, arises in this connection as to the effect of the champerty acts on the covenants for title contained in the conveyance. It would seem that when the purchaser buys with knowledge of the state of the title, courts will not lend their aid to enforce the covenants which he receives.[1] But when his

son why the law should interfere to cure the effects of negligence at the expense of confounding settled distinctions."

[1] For as has been said, "It was ever the purchaser's restless cupidity, stimulated by the low price of those dormant claims, and by the prospect of large profit, which attacked the quiet and repose of society; and to give such a construction to the statute as would permit the buyer of dormant claims securely to take a deed or covenant from the claimant, and if he failed to recover by a demise in the name of such claimant to indemnify himself by a suit against his vendor upon the covenant, would be to encourage and not to suppress the spirit of champerty." Williams *v.* Hogan, Meigs, (Tenn.) 189. The statute in that State, however, rendered such a sale void for all purposes. The doctrine has there been steadily adhered to.

An early case in Pennsylvania (Mitchell *v.* Smith, 1 Binn. 110), and three of about the same date in New York (Belding *v.* Pitkin, 2 Caines, 147; Whittaker *v.* Cone, 2 Johns. Cas. 58; Woodworth *v.* Janes, id. 417), arose under peculiar circumstances, and are illustrative of this question. Some time after the settlement of Pennsylvania, difficulties sprung from conflicting claims to lands in the northern part of that State, derived on the one hand from the Proprietaries or the Commonwealth, and on the other from the "Susquehanna Company" under the title of Connecticut; and after years of contest, and even some bloodshed, Congress interfered, and commissioners appointed by its authority decided the right of government to be in Pennsylvania, leaving, however, the question of particular titles untouched. Many old settlers under the Connecticut title remained, and new ones intruded; and finally Pennsylvania, in 1795, passed the Intrusion Law (11 April, 1795; 3 Smith's Laws, 209, and see the note in that volume), whose first section imposed a penalty upon any one who should intrude or settle within certain counties named, under any "half share right or pretended title not derived from the authority of this Commonwealth," and the second section made it also penal for any person to combine or conspire for the purpose of conveying or settling any such lands. In Woodworth *v.* Janes, *supra*, decided in New York in 1800, a bill filed by the purchaser of a Connecticut title to compel repayment of that part of the purchase money which had been paid was dismissed by the court, on the ground that, as there was evidence that the purchaser bought *with knowledge of the state of the title*, equity could not lend its aid either to enforce or rescind such a contract but would leave the parties to their remedies, if any, at law; and in the subsequent case of Whittaker *v.* Cone (decided after Woodworth *v.* Janes though reported in a prior part of the volume), where the plaintiff sued at law upon promissory notes given for the purchase money of such a title, the court refused to sanction a recovery and the plaintiff was nonsuited. A similar decision was made in the same State in Belding *v.* Pitkin, *supra*; while in Pennsylvania the case of Mitchell *v.* Smith, *supra*, presenting facts almost identical with those in Whittaker *v.* Cone, came before the court about the same time, and after elaborate argument was decided in favor of the defendant.

The ground taken by these cases necessarily assumes that under such circumstances the covenants cannot be deemed collateral to the transaction, as to which see the notes to Collins *v.* Blantern, 1 Smith's Leading Cases; Smith on Contracts, 192; for the very object of a purchaser who, being fully cognizant of the state of the title, obtains them, is thereby to protect himself in the very transaction forbidden by the law. Where,

conduct has not been such as to bring himself within the spirit of the champerty acts, it would also seem that however inoperative the transfer might be as against the party in possession, yet in the absence of absolute statutory prohibition, it is valid as between the parties themselves,[1] and will operate not merely by way of estoppel to the grantor,[2] but the covenants in the deed can be made available to the grantee.[3]

§ 52. The result, then, of the authorities connected with the doctrine of actual seisin appears to be this. It is probable that the covenants for seisin and of good right to convey were either introduced or applied in conveyances in some of the colonies in this country as assurances to the purchaser that there was no such adverse possession as would render the deed inoperative as a muniment of title, — as assurances that the vendor had such an actual seisin of the subject of the purchase as would give him a *good right to convey it within the spirit of the statutes referred to.* With this interpretation, the language used in the cases appears perfectly intelligible. The only case in which it would appear that the covenants could not be used for that purpose would be where the purchaser bought with such knowledge of the state of the title as to bring the case within the champerty acts.

§ 53. It will be observed that so far as those statutes are con-

however, both parties are *in pari delicto*, or where a statute has made the transaction absolutely void, as was the case with the champerty acts in Kentucky (Breckenridge *v.* Moore, 3 B. Mon. 629, 645 ; Graves *v.* Leathers, 17 id. 668) and elsewhere, the covenants are useless to the party receiving them. Lee *v.* Colehill, Cro. Eliz. 527 ; Waters *v.* Dean and Chapter of Norwich, 2 Brownl. 158.

[1] Br. Ab. tit. Feoffment, pl. 19 ; Co. Litt. 369 ; Upton *v.* Barrett, Cro. Eliz. 445, per Beaumont, J. ; Abernathy *v.* Boazman, 24 Ala. 193 ; Middleton *v.* Arnolds, 12 Gratt. (Va.) 489.

[2] Wade *v.* Lindsey, 6 Met. (Mass.) 407 ; Den *v.* Geiger, 4 Hals. (N. J.) 235 ; Jackson *v.* Demont, 9 Johns. (N. Y.) 55; Livingston *v.* Peru Iron Co., 9 Wend. (N. Y.) 516 ; Van Hoesen *v.* Benham, 15 id. 165 ; Livingston *v.* Procsus, 2 Hill, (N. Y.) 528 ; Edwards *v.* Roys, 18 Verm. 478.

[3] As in Phelps *v.* Decker, 10 Mass. 267. This case was fully stated in the fourth edition of this treatise. Its decision must necessarily have been the ground of that in Van Hoesen *v.* Benham, 15 Wend. (N. Y.) 165, where the grantor was admitted as a witness for the grantee *on the release of the covenants for title* contained in a deed which, under the champerty acts, was inoperative as to third persons. A decision to the contrary in Williams *v.* Hogan, Meigs, (Tenn.) 187, was cited approvingly by the court in Abercrombie *v.* Baldwin, 15 Ala. 371 ; but in the more recent cases of Harvey *v.* Doe, 23 id. 637, and Abernathy *v.* Boazman, 24 id. 189, it was expressly held that the deed was valid as between the parties, and it was said that the decision in Tennessee must be considered as based upon the positive terms of its statute. As has been seen, there has been recent legislation in that State ; *supra*, p. 64, n. 4.

cerned, it is immaterial whether the adverse possession has been recent in its commencement, or has continued for so long a time as, under the limitation acts, to have ripened into a perfect title. It is the *existence* of the adverse possession which gives occasion for the offence which these statutes forbid — which deprives the vendor of his "right to convey" — which gives to his deed no effect as against the one in possession — and which therefore causes a breach of the covenants referred to.

§ 54. Where, however, such statutes are not in force, and consequently where no such construction can consistently with principle be given to these covenants, the duration of the adverse possession may be an important element in determining the question of the breach of the covenant for seisin. Where the adverse possession has been so actual, continued, visible, notorious, distinct, and hostile,[1] as under the limitation acts to have formed an indefeasible title, it is obvious that the covenant for seisin must be broken.[2] It is not, however, altogether free from doubt whether such would be the case if the possession had not endured for the requisite length of time;[3] and it is certain that the English courts seem disposed at the present day to treat mere possession unaccompanied by right as destitute of all the qualities of an estate.[4]

[1] See the note to Taylor *v.* Horde, in 2 Smith's Leading Cases.

[2] Wilson *v.* Forbes, 2 Dev. (N. C.) 30.

[3] In Thomas *v.* Perry, Pet. (C. C. U. S.) 52, Washington, J., was of the opinion that, "if the possessions amounted to actual ousters under claims of title, however defective, the covenant of seisin was broken;" or, as he subsequently said, "that if at the time the covenant was entered into the grantor was disseised, the covenant is broken, how good soever his title may be." p. 55. (This, it should be observed, was said without any reference to the champerty acts, which were not in force in New Jersey.) The case, however, was decided upon another ground.

In the first edition of this treatise, the proposition thus stated in the text as matter of doubt was treated as if settled in accordance with the authority just referred to. But on more careful examination of the cases cited in support of it, none but Thomas *v.* Perry appeared to go to that extent. In Wilson *v.* Forbes, 2 Dev. (N. C.) 30, the possession had lasted for twenty-five years, and was therefore an indefeasible one. In Wheeler *v.* Hatch, 3 Fairf. (Me.) 389, the report merely says that the grantor was "not seised," but says nothing of an adverse possession, while the expressions in Phelps *v.* Sawyer, 1 Aik. (Verm.) 157, 158, are properly referable to the effect of the champerty acts; *supra*, § 50. In Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 430, however, the court in giving its general views on the nature of the covenant (see them cited *supra*, p. 58, n. 2), expressed an opinion that "a covenant of seisin is broken if the covenantor have not the possession, the right of possession, and the right or legal title."

[4] Doe *v.* Hull, 2 Dowl. & Ry. 38; Cully *v.* Doe, 11 Ad. & Ell. 1008; Doe *v.* Martyn, 8 Barn. & Cress. 497. In Jerritt *v.*

§ 55. It may be thought that too much space has been occupied with these decisions upon the nature of a covenant usually accompanied by others which would seem to correct, by their own scope and application, any difficulty which could arise from the purchaser's want of remedy in case of subsequent loss, if he had received an actual seisin at the time of his purchase. But although if the covenant for seisin were the only one in the conveyance, the questions just considered would have much practical importance, yet they possess scarcely less even where there are also covenants for quiet enjoyment or of warranty. For these last, which are said to assure the purchaser's possession, are therefore broken only by his eviction from it, and although the doctrine of constructive eviction has been liberally extended, yet in the absence of local doctrine, there is remembered no well-considered decision which has allowed a purchaser to elect to consider himself evicted, by buying in the paramount title before

Weare, 3 Price, (Exch.) 575, the vendor covenanted generally that he was seised in fee without any condition or other estate whereby to alter, bar, change, charge, burden, impeach, incumber, or determine the same and had good right to convey the same, and it appeared that the lady of the manor had previously demised a portion of the subject of the purchase for ninety-nine years, and the lessees had entered upon and continued to enjoy possession, it was held, notwithstanding the able argument of Mr. Preston for the plaintiff, that the covenants did not extend to these leases. It was asked by the court, "What can a man be supposed to covenant against beyond the validity of the title, and most assuredly not against these surreptitious pocket leases?" The action of covenant, it was added, only extended to the consequence of legal acts. (Hayes *v.* Bickerstaff, 1 Vaughan, 118, viz. that the law shall never judge that a man covenants against the wrongful acts of strangers.)

Upon this decision, however, Sugden has said: "It will be observed that the leases were accompanied with actual possession by the lessees, who had expended money on the property. They were, therefore, within the covenants, and unless the covenants were held to extend to them, general covenants for title would be waste paper. They are always intended to guard against a title adverse to the covenantor's, although it may not be a lawful title. Clearly the leases were a charge on the property *at the time of the conveyance*, and an ejectment at all events was necessary to dispossess the lessees. They therefore were an incumbrance within the covenant. It is not like the case of interruptions subsequently to the conveyance, by persons not claiming lawfully. The case was argued upon much higher grounds, and this probably led the court not to give due weight to the above simple view of it." Sugd. on Vend. (14th ed.) 601. By these higher grounds is meant those taken by Preston in Taylor *v.* Horde, *supra*, p. 53, n. 1, and he never forgave the decision in Jerritt *v.* Weare, as the Preface to 3 Abstracts of Title shows. Sugden gives no opinion as to this, but questions the decision because the general covenants for title were held not to extend to these leases, under which an adverse possession, defeasible only by an ejectment, had sprung; and this seems to have been generally adopted by the profession, for Dart, in general quite willing to criticise Sugden, says, "This decision seems to be of very doubtful authority." Dart on Vend. (5th ed.) 783.

it shall have been hostilely asserted.[1] Yet there are many instances in which this could be far better for him (it being always understood that his damages are measured by what he has paid) than to wait till the paramount owner should choose to enforce his claim. Where, under such circumstances, the covenant for seisin is held to have been fully answered by the transfer of the actual seisin, the purchaser is in the same position as if the covenants for quiet enjoyment or of warranty were the only ones in the deed,[2] and he is obliged to await the time of his involuntary eviction, instead of purchasing in the title, and thus acquiring a right to damages upon his covenant for seisin to the extent of the amount paid by him.

§ 56. The doctrine of actual seisin does not, however, seem to prevail throughout the States generally,[3] but the covenant for seisin is generally regarded as a covenant for the *title*, the word being used as synonymous with right;[4] and although there would be no question that it would be broken by an adverse possession, continued for the length of time required by the limitation acts,[5] yet such a possession would itself amount to an indefeasible title, which, if not marketable, would only be because its validity was a question of evidence rather than of law.

§ 57. It may, however, be observed that if the law of covenants for title be abstractly treated as a part of the law of real estate, the student will be constantly led into difficulties. The law of real estate is a highly artificial system, whose exact sources as to many of its branches have not to this day been precisely traced, based upon rules many of which sprang from and were applicable to a different state of society and which require caution as to their change. It is acknowledged that it is of less consequence what may or may not be the rule on a particular branch of this part of the law, than that the rule, when once established, should be looked upon as a rule of property, and as such subject not to judicial, but to legislative alteration. But the law of covenants for title is, as it were, collateral to this system. In part it is subject to its rules, and in part it is a branch of the general law

[1] See Ch. VII.

[2] Clark *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 372.

[3] Only, it would seem, in Illinois, Maine, Massachusetts, possibly in Nebraska, and to a limited extent in Ohio, *supra*, § 42.

[4] *Supra*, § 41.

[5] See *supra*, § 54.

of contracts, and the intention of the parties as expressed by the tenor of the whole instrument is the guide to construction. To say, therefore, that a particular construction given to a certain covenant is or is not the law of a State, means practically no more than that, in cases of difficulty, the intention of the parties will, to a certain extent, be referable to that construction.

But while the intention of the parties is to be the governing rule, yet it is conceived that in most instances in which the relation of vendor and purchaser is entered into, that intention, when applied to the averment that the vendor is seised, and that he will respond in damages if he be not, extends beyond such a mere seisin as will enable the purchaser to obtain possession in the first instance. The want of present possession is a defect which can generally be discovered by immediate observation or inquiry, and is not one against which a purchaser usually seeks to protect himself by a covenant; but it is not so as to a defect in the title.

§ 58. Apart from this local construction of the covenant for seisin, it is defined to be "an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey;"[1] and, owing to the precision of language in which it is expressed in England, no case can there be found in which less than an exact compliance with this definition has been held sufficient to prevent its breach. Nor upon this side of the Atlantic is there any material difference of opinion, wherever this definition has been recognized.

Thus it is held that the covenant is broken if the grantor has only an estate tail;[2] or if there be an outstanding estate for life;[3] or, *under certain circumstances*, a term for years;[4] a paramount

[1] Howell *v.* Richards, 11 East, 641, per Lord Ellenborough.

[2] Comstock *v.* Comstock, 23 Conn. 352.

[3] Frazer *v.* Board of Supervision, 74 Ill. 282; Wilder *v.* Ireland, 8 Jones L. (N. C.) 90; Mills *v.* Catlin, 22 Verm. 106.

[4] Van Wagner *v.* Van Nostrand, 19 Io. 422; that is to say, such a term of years as should properly defeat the "assurance that the grantor has the very estate in quantity and quality which he purports to convey." As a general rule, however, no one selling real estate in a city would dream that his covenant was broken by there being a tenant from year to year in possession. Usually, the rent is apportioned, as are the taxes, interest on incumbrances, etc., up to the date of the conveyance, and the tenant attorns to the purchaser. Such a tenancy for years is obviously no breach of the covenant for seisin; Lindley *v.* Dakin, 13 Ind. 389; Page *v.* Lashley, 15 id. 152; Kellum *v.* Berkshire Ins. Co., 101 id. 455; nor, in most cases, of the covenant against incumbrances; see *infra*, § 77.

right in another to divert a natural spring,[1] or to prevent the grantee from damming water to a certain height when that right is reserved to him by his deed.[2] So where the title failed to certain flats which purported to pass by the deed;[3] or where a railroad was in possession of a strip of land under deed from the grantor.[4] So where one of two tenants in common purported to convey the entire estate with a covenant of seisin, the latter was broken as to one half of the estate conveyed;[5] and *a fortiori* where one having covenanted that he was seised of an undivided portion of the premises, it turned out that a partition had been made.[6] So a breach will occur if no such land exist as that purported to be conveyed;[7] and the covenant has been held to extend not only to the land itself, but to all such things as should be properly appurtenant to it and pass by a conveyance of the freehold. Thus it has been held to be broken where the grantor had before the conveyance sold to another a quantity of rails which had been erected into a fence and thereby become a fixture; and the same doctrine has been applied generally to buildings or other fixtures upon the land the right to remove which was vested in other parties and did not pass to the purchaser by the conveyance.[8] In another case it was held that where a lot had been conveyed without mention of the buildings erected

[1] Clark *v.* Conroe, 38 Verm. 471, where the question was carefully considered. The declaration set forth that the defendant, as administrator, conveyed certain premises to the plaintiff with covenants for seisin and of warranty, "on which premises there was situated at the date of the conveyance a certain natural spring of water, essential to the use and occupation of said premises." The right to use this spring had, however, been previously conveyed by the defendant's testator, which was assigned as a breach of the above covenants, to which the defendant demurred. The court held that the spring formed part of the land conveyed to the plaintiff, and as the defendant had no title to the same his covenant for seisin was broken. The existence of the paramount title to the spring was also held to be a breach of the covenant of warranty; in regard to this see *infra*, Ch. VIII. This case in Vermont has been approved and followed in Lamb *v.* Danforth, 59 Me. 322.

[2] Traster *v.* Snelson, 29 Ind. 96; Walker *v.* Wilson, 13 Wis. 522; Hall *v.* Gale, 14 id. 55; s. c. 20 id. 293. And in Adams *v.* Conover, 87 N. Y. 422, it was held that this doctrine applied even though there was no express reservation in the deed.

[3] Montgomery *v.* Reed, 69 Me. 510.

[4] Messer *v.* Oestreich, 52 Wis. 684.

[5] Downer *v.* Smith, 38 Verm. 464.

[6] Morrison *v.* McArthur, 43 Me. 567.

[7] Bacon *v.* Lincoln, 4 Cush. (Mass.) 212; Basford *v.* Pearson, 9 Allen, (Mass.) 389.

[8] Powers *v.* Dennison, 30 Verm. 752; Van Wagner *v.* Van Nostrand, 19 Io. 427; West *v.* Stewart, 7 Pa. 122; s. c. but not s. p., 14 id. 336. In this case the covenant was one of warranty, but the removal of the buildings was held to be an eviction.

thereon, only so much of the latter as was upon the land conveyed passed as part of the freehold, and the right of third parties to remove other portions of the house projecting over the adjoining land was held not to be a breach of the grantor's covenant for seisin.[1] And obviously such a decision does not conflict with the preceding class of cases, but holds merely that improvements not upon the lot itself do not pass by operation of law with a conveyance of the lot.

§ 59. On the other hand, it seems settled that the covenant, as generally expressed in its short form, is not broken by the existence of such easements or incumbrances as do not affect the technical seisin of the purchaser. Thus the existence of a highway over part of the land conveyed is no breach of this covenant,[2] since it is considered that although the public may have a right of passage over the way, the freehold technically remains in the owner of the soil.[3] So with respect to a judgment, a mortgage, or a right of dower; however these may operate as a breach of the covenant against incumbrances, they do not affect the covenant for seisin,[4] since a judgment or a right of dower does not

[1] Burke *v.* Nichols, 2 Keyes, (N. Y.) 671. "The defendant," said the court, "is correct in claiming that under his deed from the plaintiff his rights in respect to the dwelling-house and fence on the lot thereby conveyed are the same as if such structures had been specifically mentioned in the grant. If the grantor had title to them, it passed by the deed; if he had not title to such structures or any part of them, his covenant of seisin was broken to that extent, and the defendant has a remedy for the breach. But the rights of the defendant thus acquired do not extend to such parts of the house and fence as are attached to and rest upon the soil of the adjoining lot. Those structures, by the operation of the very principle upon which the defendant relies, are a part of the land on which they stand; and as the adjoining lot is not covered by the deed, the defendant has no claim against the plaintiff by reason of failure of title to that portion of the house and fence which stands thereon."

[2] Vaughn *v.* Stuzaker, 16 Ind. 340; Whitbeck *v.* Cooke, 15 Johns. (N. Y.) 483. As to whether a public road is a breach of the covenant against incumbrances, see Ch. V. But where land was conveyed as bounding on certain streets which were to be opened according to a general plan, it was held that the refusal of the grantor to open those streets was a breach of the covenant of warranty. Trutt *v.* Spotts, 87 Pa. 339; see *infra*, Ch. VIII. And *a fortiori*, it is presumed, of a covenant for seisin. McDonald *v.* McElroy, 7 Pac. Coast L. J. 343.

[3] 2 Inst. 705; Goodtitle *v.* Alker, 1 Burrow, 133; Peck *v.* Smith, 1 Conn. 103–147; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357; Jackson *v.* Hathaway, 15 id. 449; Lewis *v.* Jones, 1 Pa. 336.

[4] Fitzhugh *v.* Croghan, 2 J. J. Marsh. (Ky.) 430; Sedgwick *v.* Hollenback, 7 Johns. (N. Y.) 380; Tuite *v.* Miller, 10 Ohio, 383; Massey *v.* Craine, 1 McC. (S. C.) 489; Lewis *v.* Lewis, 5 Rich. L. (S. C.) 12. Obviously an unauthorized removal of certain fixtures by a tenant is no breach of the covenant. Loughran *v.* Ross, 45 N. Y. 792, and see Ch. VI.

divest the technical title or seisin of the grantor; and a mortgage, although in strictness it purports to pass the legal title, yet is almost universally regarded at the present day as a mere security for the payment of the debt.[1] If, however, the mortgagee had entered under his mortgage (as is allowed by local statutes in many States), the covenant would, it is supposed, be held to be broken.

§ 60. There have been cases which have held that no breach of the covenant will be caused by the happening, or possibility of happening, of future contingent events which might affect the title. Thus where the alleged breach was that one of the parties to a deed was a minor, it was held that the title having passed to her grantee,[2] there could be no breach of the covenant until disaffirmance by her after majority, until she entered or in some legal mode avoided the conveyance.[3] So where the grantor was a sheriff's vendee under judgment of foreclosure of a mortgage, it was held that a subsequent order of the court, setting aside the sale and opening the judgment, did not work a breach of the covenant for seisin.[4]

[1] The text was cited in Reasoner *v.* Edmundson, 5 Ind. 394, where it was held that the mortgagee not having entered, the covenant for seisin was not broken.

[2] See as to this, Bool *v.* Mix, 17 Wend. (N. Y.) 132.

[3] Van Nostrand *v.* Wright, Lalor's Sup. to Hill & Denio's R. (N. Y.) 260. The minority of the grantor is, however, a breach of the covenant for good right to convey. Nash *v.* Ashton, T. Jones, 195.

[4] Coit *v.* McReynolds, 2 Rob. (N. Y.) 658. "The covenantor," said the court, "either was seised or he was not, at the time he made his covenant. If he was seised, his covenant was not broken *at the time*, and it would not be broken afterwards. Suppose a man conveys his property to an innocent party in fraud of his creditors, and the court should set aside the deed (if a court could be found to do such a thing), would an action lie by the grantee for a breach of the covenant for seisin? I think not." The Massachusetts cases already referred to (*supra*, § 42 *et seq.*) were also cited as proving that "a mere defeasible title will not work a breach of the covenant for seisin," but this is not the law in New York, in the sense in which those cases maintain this doctrine.

Pollard *v.* Dwight, 4 Cr. (S. C. U. S.) 421, has been said to decide that one who, in possession under a patent, conveys with a covenant of seisin, would not be liable thereon if such patent were voidable and with it the title to the premises, but on examination the case will show that the question was merely whether an unsworn surveyor was a competent witness to prove that the premises conveyed were included within an alleged prior patent. "The prior claims," said Marshall, C. J., "rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle. If they were mere claims, not good titles, they ought not to have been stated to the jury." It is apprehended that if the identity of the land had been properly established, there would have been no question as to the breach; Fitch *v.* Baldwin, 17 Johns. (N. Y.) 161; though in that case the purchaser was held to be

But it may be observed of these cases that if, as the weight of authority proves, a covenant for seisin is satisfied only by the transfer of an *indefeasible* title, it is technically broken as soon as it is made if the title be from any cause defeasible,[1] and the grantee's difficulty would seem to be less as to the breach of the covenant than the right to recover at that time more than nominal damages.[2]

An analogy may be found in the rule with respect to chattels. In the sale of these a warranty of title is implied by the civil and the common law. But a present possession is all that can ever be transferred. Yet a subsequent loss of possession by a title paramount will be a breach of this warranty, because the vendor is understood to have transferred a possession which can be lawfully retained.

§ 61. As respects the pleadings in an action upon this covenant, it has been settled from an early period that in assigning the breach of the covenants for seisin and of good right to convey it is unnecessary to do more than negative the words of the covenant generally. In Bradshaw's case,[3] which was an action brought on a covenant in a lease that the lessor had full power to convey, it was held "to lie more properly in the knowledge of the lessor what estate he himself has in the land which he demises, than the lessee, who is a stranger to it; and therefore the defendant ought to show what estate he had in the land at the time of the demise made, by which it might appear to the court that he had full power and lawful authority to demise it." In a later case,[4] where the covenant was contained in a conveyance of a freehold, it was endeavored, on demurrer, to distinguish it from that just cited, "because the plaintiff ought to have shown of what estate the defendant was seised, in regard he had departed with all his writings concerning the land, in presumption of law, and therefore the plaintiff well knew the title; and it is not like to Bradshaw's case, because there the covenant was with the lessee for years, who had not the writings." But this distinction was not recognized, and the rule

estopped by being himself in possession under a valid patent; "it never can be permitted to a person," said the court, "to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed he himself was seised of the premises."

[1] As to this, see *infra*, Ch. X.

[2] As to this, see *infra*, Ch. IX.

[3] 9 Rep. 60.

[4] Glinister *v.* Audley, T. Raymond, 14.

in Bradshaw's case has since been consistently adhered to, and applied as well to covenants in a conveyance of a freehold as of a leasehold estate.[1]

§ 62. As a consequence of this, it is well settled that in an action on the covenant for seisin it is unnecessary either to aver an eviction in the declaration or lay any special damage.[2] A distinction thus exists, as respects the pleadings, between the covenant for seisin (with which may be classed the covenant for right to convey) and the other covenants for title, as, in suing upon the latter, it seems in the first place generally necessary that the incumbrance or paramount title should be particularly specified in the declaration, as well, perhaps, as the results which it has caused.[3]

§ 63. Nor is it necessary that in a suit upon the covenant for seisin the plaintiff's subsequent pleadings should set forth the particulars of the paramount title. Although in an early case in Massachusetts,[4] Parsons, C. J., in stating some general propositions, remarked that "the defendant in his bar should regularly maintain his seisin, and then the plaintiff in his replication should aver who in fact was seised;" yet as was subsequently said in New York,[5] that case presented a question of *evidence* merely, and not a question of *pleading*. "All that is incumbent on the plaintiff," said the court there, "is to negate the title of the defendants, who plead affirmatively and generally that they had a good title,

[1] Muscot *v.* Ballet, Cro. Jac. 369; 2 Saund. 181 *b*, note 10; Floom *v.* Beard, 8 Black. (Ind.) 76; Traster *v.* Snelson, 29 Ind. 96; Socum *v.* Haun, 36 Io. 138; Blanchard *v.* Hoxie, 34 Me. 376; Marston *v.* Hobbs, 2 Mass. 433; Wait *v.* Maxwell, 4 Pick. (Mass.) 88; Bacon *v.* Lincoln, 4 Cush. (Mass.) 212; Abbott *v.* Allen, 14 Johns. (N. Y.) 248; Rickert *v.* Snyder, 9 Wend. (N. Y.) 421; Lot *v.* Thomas, Penn. (N. J.) 300; Bender *v.* Fromberger, 4 Dall. (Pa.) 436; Clarke *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 372; Mackey *v.* Collins, 2 Nott & McC. (S. C.) 186; Pollard *v.* Dwight, 4 Cr. (S. C. U. S.) 430; Duval *v.* Craig, 2 Wheat. (S. C. U. S.) 62, note. It seems, however, to have been formerly otherwise in Ohio, under a local statute which has since been repealed; see Robinson *v.* Neil, 3 Ohio, 526. The early case to the same effect in Connecticut of Wilford *v.* Rose, 2 Root, 14, probably depended on some local statute, as otherwise it is opposed to the current of authority. Care must be taken to distinguish these cases from those in which the breach of the covenant is set up as a defence to payment of the purchase money, where the defendant, the purchaser, having pleaded the plaintiff's covenant for seisin and assigned the breach by negativing the words of the covenant, judgment has, upon demurrer, been given for the plaintiff. This is upon the ground that the mere absence of title will not in general be a good defence to payment of purchase money. See *infra*, Ch. XIV.

[2] Abbott *v.* Allen, 14 Johns. (N. Y.) 248; Bird *v.* Smith, 3 Eng. (Ark.) 368.

[3] See *infra*, Ch. III., V., and VII.

[4] Marston *v.* Hobbs, 2 Mass. 433.

[5] Abbott *v.* Allen, *supra*, per Platt, J.

and the general replication in this case is sufficient. This differs from the class of cases where the plea avers a general performance of the covenant; and then the plaintiff is required in his replication to specify wherein the breach has been committed: for instance, in an action of covenant for not repairing a leased messuage, the declaration may assign the breach generally that the covenantor did not repair, etc.; the defendant may then plead generally a performance of his covenant, and the plaintiff then is required in his replication to specify wherein the repairs have been omitted, in order that the defendant may be apprised, with reasonable certainty, what is the object of the suit. The reasons for requiring such a special replication are, first, that the subject to which the covenant relates is perfectly known to the party complaining of the breach; and, secondly, the suit has a more general aspect, and the subject of the breach is multifarious. Therefore, the law in such case most reasonably requires the replication to specify that a chimney has fallen down, that the windows are broken, and that the barn is unroofed, or that the fences are prostrate, etc. In this case, the point in controversy is single and abstract. The question is merely whether the defendants had an indefeasible title, and the only evidence in relation to that title may be exclusively in the power of the defendants." [1]

§ 64. Later in New York, however, and in Michigan, statutory modifications of the common law system of pleading seem to have led to the adoption of a different rule. In the former State, where under the code no replication is necessary, but issue is joined by the service of the answer, it would seem according to a recent case [2] that the defendant in an action for breach of the covenant of seisin need not set up in his answer performance of the covenant, but may put in a general denial, and that therefore the complaint, though it need not set out the title in detail, should state the defects with sufficient particularity to enable the defendant to frame his defence. A similar rule has prevailed from a somewhat

[1] It is of course hardly necessary to mention that in suing on the covenants for title the plaintiff may recover on the count that is well laid, although the others may be defective. Blanchard *v.* Hoxie, 34 Me. 376. And in Brady *v.* Spruck, 27 Ill. 480, where the declaration contained one count only on the covenants for seisin, for right to convey and of warranty, and the breach was assigned by negativing the words of each covenant, a demurrer for duplicity was overruled.

[2] Woolley *v.* Newcombe, 87 N. Y. 605.

earlier date in Michigan, where, in such an action, the statutory general issue has been held to be a complete denial of the plaintiff's cause of action.[1]

§ 65. As respects the burden of proof, it is settled that the rule as to the evidence corresponds with the rule as to the pleadings, and in the absence of statutory changes in the common-law system of pleading, the knowledge of the state of the title being supposed to rest with the defendant, he is bound in the first instance to maintain the affirmative of his covenant. It is considered that until the grantor discloses his title the plaintiff holds the negative merely, and is not bound to aver or prove any fact in regard to the outstanding title.[2] Hence, if upon the trial of the issue neither party offer any evidence, the plaintiff is entitled to judgment.[3]

[1] Ingalls *v.* Eaton, 25 Mich. 32 ; Peck *v.* Houghtaling, 35 id. 127.

[2] Abbott *v.* Allen, 14 Johns. (N. Y.) 253, where it was said, "The grantor has no right to shift the responsibility from his own shoulders by imposing it on the grantee to aver and prove at his peril any particular outstanding title." So also in Cockrell *v.* Procter, 65 Mo. 41, citing the text. But as will be seen this has been since changed in New York.

[3] Abbott *v.* Allen, *supra;* Potter *v.* Kitchen, 5 Bosw. (N. Y.), where the subject was elaborately examined ; (but these New York cases were overruled in the later case of Woolley *v.* Newcombe, *supra;*) Baker *v.* Hunt, 40 Ill. 266; Swafford *v.* Whipple, 3 G. Gr. (Io.) 264 ; Schofield *v.* Iowa Co., 32 Io. 321 ; Marston *v.* Hobbs, 2 Mass. 437 ; Bircher *v.* Watkins, 13 Mo. 521 ; Cockrell *v.* Procter, 65 id. 41 ; Mecklem *v.* Blake, 16 Wis. 102 ; Beckmann *v.* Henn, 17 id. 412. While it is true that in some cases the plaintiff, after averring generally that the defendant was not seised, has assumed the burden of proof and gone on with his evidence to show the defective title which he had received ; Pollard *v.* Dwight, 4 Cr. (S. C. U. S.) 431 ; Bacon *v.* Lincoln, 4 Cush. (Mass.) 212 ; yet this does not affect the rule itself as generally established. "It is a well-settled rule of evidence," said the court in Swafford *v.* Whipple, *supra*, "that the party who alleges shall prove the affirmative of any proposition. Ordinarily the issue lies upon the plaintiff, and the *onus probandi* is on him to establish what he affirms. But it frequently happens that in making up an issue the defendant assumes the affirmative proposition, or confesses and seeks to avoid the action, and would fail if no evidence in avoidance should be adduced by him. In such event the proof is incumbent on the defendant, as the party who would fail if no evidence should be given on either side, or as the party who has thrown a negative proposition on the plaintiff, which might be difficult and perhaps impossible for him to prove, and in relation to which the defendant has all the evidence in his possession. Hence it is laid down that the *onus probandi* lies upon the party who seeks to support his action or defence by a particular fact of which he is supposed to be cognizant. . . . In the present case there was but a single point in controversy before the jury. The defendant pleaded that he was lawfully seised of the premises. Upon this question he assumed the affirmative ; it was for his interest to prove it, as it would operate a complete bar to the action. The nature of the title to the premises may have rendered it extremely difficult, or even impossible, for the plaintiff to prove the negative averment, as the only evidence in relation to the title may have been exclusively under the control of the defendant. If he had

On the other hand, if, as in Michigan[1] and New York,[2] under statutory systems of pleading, the defendant is not required to set

title at the time the deed declared on was executed, he could easily have shown it; and if he had no title, the covenant was broken, regardless of any third person who may have had the title. We conclude, then, that the court did not err in deciding that the *onus probandi* lay upon the defendant." This was approved in Schofield *v.* Iowa Co., *supra*, where, the plaintiff having alleged that the defendant "was not the true owner of the premises," and the latter having denied "that he was not the true owner of said land," no evidence was offered on either side except the deed from the plaintiff to the defendant, and the court held that the defendant's denial amounted to an averment of seisin, and that in the absence of all proof the plaintiff was entitled to judgment, and the correctness of this decision was recognized in Blackshire *v.* Iowa Homestead Co., 39 Io. 624.

On the other hand, in delivering the opinion of the court in Woolley *v.* Newcombe, *supra*, which, owing to the alteration in pleading caused by the code, reversed the former decision in New York, Rapallo, J., said: "The counsel for the appellant concedes that the rule invoked by him [that upheld in Abbott *v.* Allen, Potter *v.* Kitchen, &c.] is exceptional, and that the case itself is anomalous. If the rule exists as claimed, the case certainly presents the curious feature of an action for breach of covenant in which the defendant in his answer denies every allegation of the complaint except that he executed the deed, and yet a judgment must go against him on the pleadings unless he proves affirmatively that he performed his covenant, no proof of its breach being required of the plaintiff. *That this result followed under the common law system of pleading may be conceded*, [the italics are those of the author of this treatise,] but in order to ascertain whether, under our present system, the same end can be reached, it is necessary to examine the origin of the former rule and ascertain upon what it is founded." After referring to the old cases (Hancock *v.* Field, Cro. Jac. 369, &c., *supra*), the learned judge went on to say: "The reason for thus permitting the plaintiff to drive the defendant to the affirmative of the issue in an action upon this particular covenant is to be found in the system of conveyancing prevalent in England when these rules were established. The owner of a landed estate depended for his title upon his title deeds and muniments of title; these were not matters of public record, but were accessible only to the owner of the estate, who retained them in his possession. So where a party held a leasehold estate merely, it was in many cases impossible for him to show his title, which depended upon the title of his landlord. . . . Where the owner of an estate sold the fee, the right to possession of the title deeds usually passed with it, and a conveyance in fee simple usually contained a grant of all deeds, evidences, writings, &c. . . . But where a vendor conveyed only a portion of his estate he retained his title deeds for his own security, and when in a conveyance of an estate the grantor gave a covenant of seisin or warranty, the grantee was not entitled to the title deeds. Buckhurst's Case, 1 Rep. 1, n. It was to these rules that Platt, J. had reference in Abbott *v.* Allen, where he said that a grantor giving covenants for title was not bound to deliver to his grantee the prior deeds and evidences of his title. Under these customs and this state of the law, and before the recording acts, it is easy to understand why it should be held that in an action on the covenants of seisin the vendor was bound to disclose his title. He was allowed to retain the evidences thereof for the very purpose of answering to these covenants. It is equally manifest that under our present system of conveyancing and making the title to real estate matter of public record as accessible to the vendee as to the vendor, the

[1] Ingalls *v.* Eaton, Peck *v.* Houghtaling, *supra*.
[2] Woolley *v.* Newcombe, *supra*.

forth his title in his answer, but may rest upon a mere general denial of the plaintiff's right to recover, the burden of proof is upon the plaintiff; and unless at the trial he establishes by evidence a *prima facie* case, the judgment will be for the defendant.

The consideration of the measure of damages will be found in a subsequent chapter.[1]

reason for the former rule entirely fails, and in this State it no longer has any foundation whatever to rest upon; and if the common law system of pleading still prevailed, the plaintiff, in replying to a plea of seisin, would doubtless be required to state, as in other actions of covenant, the particulars of the breach, and thus assume the affirmative. An action of this description would no longer be an exception to the general rules of pleading.

"Under the code, however, no replication is necessary; issue is joined by the service of the answer. The defendant is not bound to set up in his answer performance of the covenant, but may put in a general denial, and this puts in issue the allegation of the breach of the covenant, and throws upon the plaintiff the burden of proving it. There is nothing, consequently, either in the nature of the case or in the form of the pleadings, which should throw upon the defendant the affirmative of the issue."

[1] *Infra*, Ch. IX.

CHAPTER IV.

THE COVENANT FOR RIGHT TO CONVEY.[1]

§ 66. The covenant for right to convey has been sometimes said to be synonymous with the covenant for seisin. As the greater always includes the less, the existence of an estate in fee simple of course implies the right to convey it;[2] but the converse is far from true, and until lately it was, for reasons heretofore stated,[3] the practice in England upon the purchase of an estate to have it conveyed to such uses as the purchaser should appoint, and in default thereof to the use of himself and his heirs.[4] And hence no doubt the covenant for right to convey has in England superseded the covenant for seisin.[5] And of course the former is the appropriate covenant when the conveyance is made in execution of a power.[6]

§ 67. In some parts of this country there would appear to be a special reason for the insertion of the covenant for right to convey. For as has been seen,[7] in a few States the covenant for seisin is answered by the transfer to the purchaser of an actual though a tortious seisin, irrespective of the right by which the property is held; and where the covenant for seisin is thus limited in its application to the mere transfer of the seisin, in its narrowest signification, there would seem every reason why a purchaser should protect himself by a covenant which refers exclusively to the right, or, as it is popularly called, the title.

But it has also been seen that in the very case in which the covenant for right to convey would thus seem not to be merely

[1] For the form of this covenant see Ch. II., pp. 24, 28, n. 3.

[2] With perhaps the single exception of the conveyance by a minor, who though seised in fee has no right to convey, save subject to disaffirmance by him after majority. Nash *v.* Ashton, Skinner, 42; s. c. T. Jones, 195; *supra*, p. 75, n. 3.

[3] *Supra*, p. 23.

[4] See, for example, such a deed in Thackeray *v.* Wood, 5 Best & Smith, (Q. B.) 25; *infra*, p. 83, n. 3.

[5] 1 Hughes's Practice of Sales of Real Property, 411.

[6] Sugd. on Vend. (14th ed.) 573; Dart on Vend. (5th ed.) 544.

[7] *Supra*, § 42 *et seq.*

synonymous with the covenant for seisin and thus superfluous, it should have been held to have no greater or other scope. In a previous chapter it was shown that this course of decision arose from the covenants for seisin and for right to convey being considered assurances to the purchaser that the vendor had such a present seisin as would enable him, without violating the champerty acts, to transfer the estate, and consequently as having a good right to convey it under those acts.[1]

§ 68. It has, indeed, been held in an old case that the latter covenant related to the capacity of the grantor to convey, so that where a husband and wife, seised in her right, conveyed to a purchaser, with the husband's covenant that they had good right to assure the lands, the incapacity of the wife to convey by reason of her infancy was held to be a manifest breach.[2] But it is equally clear that it was considered also as relating to the title; and where the covenant is construed according to the natural interpretation of its words, it must be broken by the absence in the vendor of the right to the premises — the *jus*, as distinguished from the *seisina*.[3]

[1] *Supra*, § 50.

[2] Nash *v.* Ashton, Skinner, 42; s. c. T. Jones, 195.

[3] Thus in Triplett *v.* Gill, 7 J. J. Marsh. (Ky.) 432, where the covenants were of good right to convey and of warranty, it was held that the former "imported only that the grantor had a right to convey, and did not imply that he had possession. Such a covenant was not broken by an adversary possession merely, but was broken only by a want of legal title in the grantor, such as he had a right to sell and convey." It may moreover be remarked of this case, that as the champerty statute was not passed till after the execution of the deed, the construction of the covenant did not come within that referred to above.

In Thackeray *v.* Wood, 5 Best & Smith, (Q. B.) 325, a vendor had, some years before the sale of the premises by him, added a cornice and certain spouts and pipes to his house, of which the effect was to drip water upon the premises of his neighbor, and he had also opened certain windows overlooking the same. By subsequent agreement in writing between the adjoining owner and himself, he acknowledged the encroachment, covenanted to remove it upon demand, and to pay a nominal rent during its continuance. He then sold the premises, covenanting that notwithstanding any act done by him he had good right to convey. Upon the purchaser's refusal to acknowledge the right of the adjoining owner and to pay the rent, an action was brought by the latter for the encroachment, and the purchaser, having been obliged to pay the damages and costs therein, brought covenant against his vendor, and it was urged on his behalf that but for the vendor's written acknowledgment, the right to the easements would have become indefeasible in time, and that his acknowledgment and payments had estopped him from setting up a title which, but for them, he might have acquired; but the court had no doubt that judgment must be for the defendant. He had sold the estate in no worse plight than that in which he found it; he had never acquired a right to the easements, and could not have derogated in any manner from the estate which he ever possessed, by an acknowledgment of which the effect was

§ 69. Apart from this, most of what has been said in the preceding chapter as to the covenant for seisin applies equally to that for right to convey. Both, according to the weight of American authority, are held to be broken as soon as made, and therefore incapable of being taken advantage of by an heir or an assignee.[1] Both are governed by the same rules as to the pleadings ;[2] and the measure of damages is the same as to both.[3]

simply to keep things *in statu quo*. No case had been cited to show that such a covenant meant more than a warranty against acts done by the party who might have incumbered or "made worse" his estate ; and though the court were not insensible to the hardship upon the plaintiff, it was of the opinion that no breach of the covenant had been committed, and upon appeal this judgment was affirmed in the Exchequer Chamber, 6 B. & S. 766.

[1] Chapman *v.* Holmes, 5 Halst. (N. J.) 20. See Ch. VIII.

[2] Jenkins, 305, pl. 79. For a recent case, the student may be referred to the pleadings in Thackeray *v.* Wood, *supra*.

[3] Bickford *v.* Page, 2 Mass. 455 ; Dunnica *v.* Sharp, 7 Mo. 71 ; Willson *v.* Willson, 5 Fost. (N. H.) 234.

CHAPTER V.

THE COVENANT AGAINST INCUMBRANCES.[1]

§ 70. In England, this covenant is frequently styled "the covenant for indemnity against incumbrances," and its place there is almost invariably *after* that for quiet enjoyment, to which indeed it is a sort of supplement, being connected therewith by the words "*and that* [i. e. the quiet enjoyment] free and clear of all incumbrances," etc.[2]

Of course a covenant thus commencing with the words "*and that* free," etc., depends for its construction upon the preceding covenant of which it thus forms a part.[3] Now nothing is better settled, both in England and America, than that the covenant for quiet enjoyment (which is, that the grantee *shall* peaceably enjoy the premises) is eminently a covenant *in futuro;* until breach, it runs with the land; it is not broken by the mere existence of an incumbrance or defect of title; its breach depends upon the disturbance or damage which that incumbrance or defect may thereafter cause. On the other hand, it is settled by a large class of cases on this side of the Atlantic that the covenant against incumbrances, as here generally expressed, standing by itself as a separate and independent covenant, and generally couched in the short form "and that the premises are free and clear of all incumbrance," is a covenant *in præsenti;* it is broken as soon as made by the mere existence of an incumbrance, without regard to future or ultimate disturbance or damage, and, being so, does not run with the land. When however instead of thus standing by itself it is linked or coupled to the covenant

[1] For the different forms of this covenant, see Ch. II. pp. 24, 28, n. 3.

[2] See *supra*, p. 24.

[3] "Unconnected with any other clause, it will be both ungrammatical and senseless. The introductory words plainly prove that it must be construed in connection with that paragraph by which it is immediately preceded; that clause being the covenant for quiet enjoyment." Platt on Covenants, 331.

for quiet enjoyment, as is usually the case in England and sometimes here, the distinction whether it is a covenant *in præsenti* or *in futuro* becomes important.

§ 71. The practical consequences of the distinction are threefold: first, as to the parties to the action on the covenant; secondly, as to the pleadings; and thirdly, as to the measure of damages. All of these will be more fully considered hereafter. Suffice it here to say that, as to the parties to the action, if the covenant be one *in præsenti*, it must be sued upon by the covenantee or his personal representatives; an heir, a devisee, or an assignee cannot sue in his own name. As to the pleadings, if a covenant *in futuro*, it is not sufficient merely to negative the words of the covenant. And as to the measure of damages, if a covenant *in futuro*, the technical damage corresponds with the actual loss; if a covenant *in præsenti*, and there has been no present actual loss, the damages are but nominal.

§ 72. Such a distinction is of less consequence in England than in this country. There all the covenants for title — that for seisin as that for quiet enjoyment — run with the land and enure to the benefit of the heir, the devisee, or the assignee. Here, in the absence of local statutory enactment, the covenant for seisin is in most of the States held to be broken as soon as made; and although doubts have at times been expressed whether this technical rule should apply to the covenant against incumbrances, which, it has been said, partakes more of the character of a covenant of indemnity (and which certainly does so as to the measure of damages), yet the general current of American authority holds it to be, equally with the covenant for seisin, a covenant *in præsenti* and broken as soon as made.[1]

§ 73. But it has been generally considered, and upon both sides of the Atlantic, that when the covenant against incumbrances is coupled with that for quiet enjoyment (as in the English form just given), it is to all intents and for all purposes a covenant *in futuro;* and although it has been urged[2] that it should receive a double construction — one which would give it the benefit of a covenant against incumbrances as respects the facts which would constitute a breach, and the other which would give it the benefit of a covenant for quiet enjoyment as respects capacity for run-

[1] In relation to this subject, see *infra*, Ch. X.

[2] Particularly, *arguendo* in Greene *v.* Creighton, 7 R. I. 1.

ning with the land — yet such a construction has never been practically adopted.[1]

[1] This distinction as to the form of the covenant was noticed in Vane *v.* Lord Barnard, Gilbert's Eq. R. 6; Carter *v.* Denman, 3 Zab. (N. J.) 273; Grice *v.* Scarborough, 2 Spears, (S. C.) 652; Jeter *v.* Glenn, 9 Rich. L. (S. C.) 377; Hutchins *v.* Moody, 30 Verm. 658. Platt regards the covenant against incumbrances as entirely one *in futuro*, his chapter on the subject being entitled "The Covenant *of Indemnity* against Incumbrances" (Platt on Covenants, ch. xi.). In the argument noticed *supra*, in Greene *v.* Creighton, the counsel considered that the cases, and particularly that of Vane *v.* Lord Barnard, had been misunderstood, and that Griffith *v.* Harrison, 4 Mod. 249 (also, 1 Salk. 197, and Skinner, 397), and Hall *v.* Dean, 13 Johns. (N. Y.) 105, were direct authorities for the construction he contended for. In Griffith *v.* Harrison, as reported in 4 Mod., the plaintiff declared on a covenant that he "should quietly enjoy free and clear of and from all arrears of rent," and assigned as a breach that the rent was in arrear and not paid. The defendant pleaded that he had left so much money with the plaintiff *co intentione* to pay it to the lessor in discharge of what rent was in arrear, which plea was held good on demurrer. If this report of the case were correct, it would certainly be an authority for the construction contended for; if the covenant had been considered strictly as a covenant for quiet enjoyment, the mere fact that the rent was in arrear and not paid would, according to all the authorities, have been no breach, and the declaration would have been held bad on the application of the familiar principle in pleading, that on demurrer the court considers the whole record and gives judgment against him who makes the first slip in the pleadings. On examining the report in 1 Salkeld, 197, and Skinner, 397, it will be found that Lord Holt decided the case upon that very ground; the plea was good enough, "but the court took exception to the assignment of the breach, for that the plaintiff did not show a disturbance in the enjoyment, or other special damnification, without which *the rent being behind is not a breach of the covenant.*" Hall *v.* Dean, *supra*, did indeed decide that the assignment of the breach of such a covenant by alleging that the plaintiff "had been forced to pay off the incumbrance," was good on demurrer; but the decision, if contrary to Griffith *v.* Harrison, must yield to it in authority. Although in Carter *v.* Denman, *supra*, this case was cited and apparently approved, yet the remarks of the court were but *dicta*. As to the case of Vane *v.* Lord Barnard, which has often been misunderstood, it was neither an action on the covenants for title contained in a conveyance of land, nor a bill to enforce specific performance of such covenants. It was a bill to enforce specific performance of an *executory* contract. The case was thus. On the marriage of Lord Barnard's daughter, the father of the intended husband covenanted to settle lands free from incumbrances upon trustees, "according to the usual limitations in marriage settlements," and Lord Barnard covenanted to settle certain lands by name upon trustees to like uses, but with these words: "that in such settlement there shall be covenants that he is seised in fee, has good right to convey, and that the trustees shall enjoy free from incumbrances." No settlement had been executed in pursuance of these articles. It happened that upon Lord Barnard's own marriage these same lands had been charged with £6,500, to be paid to such of his daughters as should be living at his death and be unprovided for; and "the bill was to have a specific performance of the articles by my lord's paying off or otherwise giving collateral security against this contingent portion of £6,500, he having then one daughter about sixteen years old. It was urged for the plaintiff that 't was usual for this court to decree a specific performance of articles and covenants, and not to depend only upon the uncertain reparation by damages, which the personal estate may perhaps not be able to satisfy; and this was not controverted, where 't was possible to be done.

§ 74. A distinction, moreover, must here be noticed between a covenant that the premises *are* free from incumbrances, or that

But the Lord Chancellor (Cowper) held that here was not any covenant that the lands were free from incumbrances, but only a covenant that he would in the settlement (which was after to be executed) covenant for that purpose; so that the parties seemed to be satisfied with a bare covenant only, and the marriage articles were only a *covenant* to *covenant;* so that inserting that covenant in the future settlement was a specific performance of those articles, and was all that my lord agreed to do, or that the plaintiff by his bill desired to have.

" The Lord Chancellor said, notice or no notice of this incumbrance was very material in this case; for where a covenant is in this manner, if any incumbrance is discovered between the executing the articles and the sealing the deed of settlement, whereof the party had no notice, that incumbrance shall be discharged, even before sealing the deed of settlement, both upon account of the fraud in concealing such incumbrance, and because it would be needless to enter into a covenant which, before entering into, is already known to be broke; but against all other incumbrances discovered afterwards, there is the party's covenant only. Now where you have notice of an incumbrance before executing the articles, 't is a stronger case than the last, for you consent with your eyes open to accept the party's covenant against an incumbrance you were aware of, and when you have chosen your method of security yourself, this court will give no other, nor make the party do a further act than by the articles he has agreed to do; and the rather in this case, for that the portion is not a certain incumbrance, but a contingent one; and therefore 't is reasonable to suppose that my Lord Barnard would not be compelled to charge his remaining estate, at all hazards, to secure against an incumbrance that was but contingent, to the prejudice of his eldest son, especially when he had provided for the younger son so plentifully; and decreed that my Lord Barnard should execute a deed of settlement, with covenants exactly pursuant to the articles only; but because the estate was subject to a *present charge*, viz. the payment of a yearly sum for the daughter's maintenance from her birth, therefore that the Lord Barnard should pay and discharge all arrears of that and the growing annuity, as it shall arise, taking acquittances from his daughter, and leaving them with the plaintiff for his security.

" 'T was strongly urged by Mr. Vernon, that supposing these articles were but a *covenant* to *covenant*, yet as soon as the articles were performed by sealing the deed of settlement, then they might come the next day and exhibit their bill to enforce an execution specifically of the covenant in such deed of settlement; and why may not the court decree that to be done now, as well as that which, after performance of this decree, they will immediately decree upon a new bill? The Lord Chancellor said, 'In this case they could not, for the incumbrance was not necessary, but contingent; and if you brought an action at law upon such a covenant, you should not recover twopence damages till a breach, which possibly may never happen. Besides, the covenant on the deed of settlement is not to be that the estate is free from incumbrances, but that the trustees shall enjoy free from incumbrances; which, so long as they do, the covenant is not broke. And, it seems, the portion being contingent, and not certain, was the reason of this part of the decree; because 't is plain, by the latter part of the decree, where the incumbrance was certain (viz. the payment of a yearly sum), the Lord Barnard was decreed immediately to discharge it; tho' by the articles he did but *covenant* to *covenant*, as is aforesaid, and there 's no other difference between these two matters.' " Here it will be noticed that the father of the husband covenanted to settle *some* lands free from incumbrances. Lord Barnard's covenant was different. He covenanted to settle certain specific lands which were subject to a known incumbrance, with a covenant to be contained in

the purchaser *shall enjoy* them free from incumbrances, and a covenant *to discharge* of incumbrances or one similarly framed whose object is the accomplishment of a thing certain at a certain time. The distinction is that where the covenant is simply one of indemnity no right of action accrues under it unless some damage is shown to have been inflicted. But where the covenant is to do a particular thing in exoneration of the covenantee, or to indemnify him against *liability*, the right of action is complete as soon as there is a failure to perform or the liability has been incurred. Thus in Lethbridge *v.* Mytton,[1] which was an action by the trustees of the defendant's wife, on a covenant to pay off within a twelvemonth certain incumbrances to the amount of £19,000, no special damage was laid or proved, and, judgment having gone by default, the sheriff's jury gave nominal damages; but this was set aside by the Court of King's Bench, Lord Tenterden saying, "If the plaintiffs are only to recover a shilling damages, the covenant becomes of no value;" and Parke, J., added, "The trustees were entitled to have this estate unincumbered at the end of a year from the marriage; how could that be enforced unless they could recover the whole amount of the incumbrance in an action on the covenant?" And this distinction is perfectly settled on both sides of the Atlantic, though at times with some variety of decision as to the construction of the contract in the particular case.[2]

the settlement that the trustee *should enjoy* them free from incumbrances. When the executory articles came to be consummated, it was "decreed that Lord Barnard should execute a deed of settlement with covenants exactly pursuant to the articles only," since such, and such only, was the true meaning of the articles on Lord Barnard's part to be performed; in other words, the trustees were, by the express terms of the articles, to take his personal covenant against a known possible contingency. But as respected the certain present charge — the yearly sum for the daughter's maintenance — the agreement stood upon a different footing, and was subject to the usual law of vendor and purchaser, which gives the latter right to a title free from all incumbrances (see *supra*, § 32, and *infra*, Ch. XIV.); and hence it was that "Lord Barnard was decreed immediately to discharge it." Nor must this case be confounded with some others (since overruled), which decided that in general a contract "to convey lands with covenants for title" will be satisfied by the conveyance of a defective title, with covenants against it, in the deed. Such is not the law, unless, as in this very case of Vane *v.* Lord Barnard, such was the express contract between the parties. See *supra*, § 32.

[1] 2 Barn. & Adolph. 772.

[2] Carr *v.* Roberts, 5 Barn. & Adolph. 78; Leeming *v.* Smith, 25 Grant's Ch. (U. C.) 79; Hogan *v.* Calvert, 21 Ala. 199; Booth *v.* Starr, 1 Conn. 249; Lathrop *v.* Atwood, 21 id. 123; Gardner *v.* Niles, 16 Me. 280; Jennings *v.* Norton, 35 id. 309; Furnas *v.* Durgin, 119 Mass.

§ 75. In considering the question what will cause a breach of the covenant against incumbrances, or in other words, what is "an incumbrance" within the true intent and meaning of the covenant, an apparent difficulty will be encountered such as is not presented in the case of the other covenants. It arises, in part, from the fact that the word "incumbrance" has no technical meaning. It was not one of the "terms of the law," and no definition of it will be found in the older books. Within the present century, an incumbrance has been defined to be "every right to or interest in the land which may subsist in third persons, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance." [1]

§ 76. Speaking broadly, this definition is correct; but the question recurs, What does "diminish the value of the land" and thus form an incumbrance, and is this a question of law or of fact?

As to this, it has been said that "nothing which constitutes a part of the estate, or which, as between the parties, is to be regarded as an incident to which the estate is subject, can be deemed an incumbrance;" [2] and again the question recurs, How shall it be determined whether the alleged incumbrance did or did

500; Williams *v.* Fowle, 132 id. 385; Dorsey *v.* Dashiell, 1 Md. 204; Sparkman *v.* Gove, 44 N. J. L. 252; Churchill *v.* Hunt, 3 Denio, (N. Y.) 321; Trinity Church *v.* Higgins, 48 N. Y. 532; Terrett *v.* Brooklyn Improvement Co., 87 id. 92; Hartley *v.* Gregory, 9 Neb. 279; Ardesco Oil Co. *v.* N. A. Mining Co., 66 Pa. 381; and see note to Smith *v.* Howell, 6 Exch. 739. Thus, "a covenant against incumbrances is not a covenant to defend a suit against an incumbrance." Lumber Co. *v.* Gustin, 54 Mich. 624. Fisher *v.* Worrall, 5 Watts & Serg. (Pa.) 478, is an obvious exception to these cases, it being there held that although a joint owner who covenanted to procure the joinder of the other owner in a deed conveying the land was liable in damages for a failure to do so, yet their amount was not necessarily measured by the consideration.

Sedgwick, in his Treatise on the Measure of Damages, p. 182, has seriously questioned the correctness of the decision in Lethbridge *v.* Mytton, but apparently without sufficient reference to the peculiar nature of the covenant. His criticism was disapproved in Trinity Church *v.* Higgins, *supra;* and in the last (7th) edition of the book it is said (p. 363, note *b*), "The same rules which state the measure of damages on breach of covenant of incumbrance do not apply to a breach of contract to remove an incumbrance, and the author's criticisms of the case of Lethbridge *v.* Mytton, 2 B. & Ad. 772, have not been supported."

[1] 2 Greenl. Ev. § 242. This definition was taken (except as to the words "which may subsist in third persons") from that given by Parsons, C. J., in Prescott *v.* Trueman, 4 Mass. 630. It was quoted with approbation in Mitchell *v.* Warner, 5 Conn. 527; Carter *v.* Denman, 3 Zab. (N. J.) 273; Chapman *v.* Kimball, 7 Neb. 399; Post *v.* Campau, 42 Mich. 90; Fritz *v.* Pusey, 31 Minn. 368.

[2] Dunklee *v.* Wilton Railroad Co., 4 Foster, (N. H.) 489.

not constitute a part of the estate, or was or was not regarded as an incident to which it was subject?

Abstractly considered, of course no parcel of real estate, whether improved or otherwise, can be said to be perfectly free from everything which would diminish its value in some degree for some purpose. If unimproved, there may be a marsh, a lake, or a ledge of rocks, which may lessen its value for arable purposes; if improved, there may be a want of light, of ventilation, or a thousand things incident to propinquity which may lessen its value for purposes of residence or commerce.

In a very recent case in Pennsylvania it was accurately said: "Incumbrances are of two kinds, viz.: 1. Such as affect the title, and 2. Those which affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former; a public road or a right of way, of the latter." [1]

Thus property which is subject to a lease may, if purchased for investment, command a higher price for that very reason, and this in proportion to the length of the term and the amount of rent; while if purchased for immediate improvement the lease will naturally lessen its value.[2] Hence in determining whether a certain thing is or is not an incumbrance within the true intent and meaning of a covenant against incumbrances, it seems evident that in some cases it must be necessary not to interpret too strictly that part of the doctrine of the law of vendor and purchaser which, after the contract of sale has been consummated by the execution of the conveyance, determines the rights of the purchaser solely by the terms of the deed itself and the covenants which it contains, but to consider what was the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser,[3] and to some extent the local usage and habit of the country.

[1] Memmert *v.* McKeen, 112 Pa. 315; and hence it was held that certain stone steps of an adjoining house which were a servitude on the property sold with a covenant against incumbrances were "a physical condition of the property, notorious in its character and affecting its value, and under all the authorities we must presume the price to have been paid with reference to it;" and see *infra*, § 80. A similar view was taken in the very recent case of Allen *v.* Kersey, 104 Ind. 1.

[2] In 5 Powell on Conveyancing, 24, it is said, "Leases outstanding at rack-rent are not incumbrances on large estates, because the income principally depends on occupiers. *Contra*, of a small estate, where there is but one tenant; there, possession may be the main object." And see *infra*, § 78.

[3] With respect to notice on the part of

Nor is this a deviation from the salutary doctrine which prohibits the introduction of parol evidence to contradict written instruments, since, as it is a leading rule that they are to be interpreted according to their subject matter, it is obvious that parol testimony must at times be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers.[1]

§ 77. The application of this principle will, it is believed, solve whatever practical difficulty may be found to exist between the various cases in which has been presented the question of what is or is not an incumbrance within the covenant.

Thus there can be no doubt that the covenant is broken by the existence of a judgment, a mortgage, an attachment, or any debt which is a lien upon the land conveyed;[2] a right of dower, whether inchoate or consummate by the death of the husband;[3]

the purchaser, it may be here observed in anticipation that if the thing be *really* an incumbrance, nothing is better settled than that the purchaser's notice of it will be no defence to an action on the covenant, and nothing is more common than for a purchaser to take a covenant against a known incumbrance (see *infra*); but on the question of what was *the subject-matter* of the contract, the purchaser's notice, or rather his knowledge, may in many cases have a material bearing.

[1] Greenleaf on Evidence, § 286.

[2] Bean *v.* Mayo, 5 Greenl. (Me.) 94; Shearer *v.* Ranger, 22 Pick. (Mass.) 447; Norton *v.* Babcock, 2 Met. (Mass.) 510; Jones *v.* Davis, 24 Wis. 229; Kelsey *v.* Remer, 43 Conn. 129; Redmon *v.* Phœnix Ins. Co., 51 Wis. 292. If, however, for any reason, the mortgage is not a lien upon the premises, there will of course be no breach; Case *v.* Erwin, 18 Mich. 434. So in Estabrook *v.* Smith, 6 Gray, (Mass.) 572, where the land was conveyed on condition that the grantee should erect a house within a year, which condition *was complied with*, the mere existence of the condition was obviously held to be no breach; "the condition as to the erection of a house made the estate defeasible, but this was not an incumbrance within the meaning of the covenant against incumbrances, nor has the estate been defeated by breach of that condition."

[3] In Powell *v.* Monson Co., 3 Mason, (C. C. U. S.) 355, Judge Story inclined to the opinion that an inchoate right of dower was not an incumbrance within the covenant. "I am not prepared," said he, "to admit the doctrine contended for at the bar, that the covenant against incumbrances is broken by the mere existence of a possible incumbrance. A possibility of dower is not, within the meaning of the covenant, an incumbrance, for that means a settled, fixed incumbrance; and if the result of the Massachusetts authorities on this point has not been mistaken by me, taking them collectively, they do not sustain the doctrine now contended for." The authorities thus referred to were Marston *v.* Hobbs, 2 Mass. 433, and Bickford *v.* Page, id. 461; but on examination they do not bear out this conclusion. However this may be, it has been since distinctly and finally settled in Massachusetts, that a right of dower, whether inchoate or otherwise, is an existing incumbrance amounting to a breach of this covenant, which, it has been said, extends to all adverse claims and liens on the estate conveyed, whereby the same may be defeated in whole or in part, whether the claims or liens be uncertain and contingent or otherwise. Shearer *v.* Ranger, 22 Pick. (Mass.) 447; Bigelow *v.* Hubbard, 97 Mass. 195; (Fuller *v.* Wright, 18 Pick. 405, was the case of an executory agreement;) Harrington *v.* Murphy, 109

or by the existence of taxes or assessments, whether presently due,[1] or which, when thereafter assessed or levied, relate back prior to the conveyance;[2] but obviously not taxes or other as-

Mass. 299; and the law is generally so considered elsewhere. Hatcher *v.* Andrews, 5 Bush, (Ky.) 561; Porter *v.* Noyes, 2 Greenl. (Me.) 26; Donnell *v.* Thompson, 1 Fairf. (Me.) 170; Smith *v.* Cannell, 32 Me. 126; Blanchard *v.* Blanchard, 48 id. 177; Runnels *v.* Webber, 56 id. 488; Henderson *v.* Henderson, 13 Mo. 152; Durrett *v.* Piper, 58 id. 551; Ward *v.* Ashbrook, 78 id. 515; Walker *v.* Deaver, 79 id. 664; Russ *v.* Perry, 49 N. H. 549; Carter *v.* Denman, 3 Zab. (N. J.) 273; McAlpin *v.* Woodruff, 11 Ohio, 120; Hudson *v.* Steere, 9 R. I. 106; Jeter *v.* Glenn, 9 Rich. L. (S. C.) 376. The supposition that a possibility is not an incumbrance, because a possibility merely, is met by the anonymous case in Sir Francis Moore's Rep. 249, pl. 393, and Haverington's case, Owen, 7.

An apparent difficulty which some of the cases present has been caused by losing sight of the distinction between a technical breach of this covenant, and a breach followed by such circumstances as give a right to actual damages. For where the covenant is, that the purchaser "*shall enjoy* free from all incumbrance," most unquestionably the covenant is not broken by the mere *existence* of a right of dower, whether inchoate or otherwise. But where the form of the covenant is that the premises "*are* free from all incumbrance," then the covenant is as certainly broken by the existence at that time of a right of dower although it may be inchoate and contingent; though at the same time if the purchaser then sue upon the covenant, his damages might be but nominal (see *infra*). But apart from the question of costs, the difference between a verdict for the defendant, and a verdict for the plaintiff with nominal damages, may be material. In Maine, the Revised Statutes provide for the measure of damages in an action for the breach of the covenant against incumbrances when the incumbrance is a right of dower; Rev. Stat. Maine, 1883, p. 697. See *infra*, Ch. IX.

[1] Almy *v.* Hunt, 48 Ill. 45; Ingalls *v.* Cooke, 21 Io. 560; Fuller *v.* Gillette, 9 Biss. (C. C. U. S.) 296; Mitchell *v.* Pillsbury, 5 Wis. 410. In Texas, the Revised Statutes provide that "the term 'incumbrances' includes taxes, assessments, and all liens upon real property;" Rev. St. 1879, p. 93, art. 558. And the Code of Dakota has copied this literally; 2 Levisee's Rev. Code, 1883, p. 883, § 633.

[2] Overstreet *v.* Dobson, 28 Ind. 256; Kirkpatrick *v.* Pearce, 107 id. 520; Blossom *v.* Van Court, 34 Mo. 394; Cochran *v.* Guild, 106 Mass. 29; (in Hill *v.* Bacon, 110 id. 387, this was not decided, but there having been a constructive eviction, the covenant of warranty was held to be broken; see *infra*, Ch. VI.;) Blackie *v.* Hudson, 117 id. 181; Carr *v.* Dooley, 119 id. 294; Coburn *v.* Litchfield, 132 id. 449; White *v.* Stretch, 7 C. E. Gr. (N. J.) 76; Fagan *v.* Cadman, 46 N. J. L. 441; Cadman *v.* Fagan, 47 id. 549; Long *v.* Moler, 5 Ohio St. 272; Rundell *v.* Lakey, 40 N. Y. 513; Craig *v.* Heis, 30 Ohio, 550; Trotter *v.* Page, 7 Weekly Notes, (Phila., Pa.) 466; Hutchins *v.* Moody, 30 Verm. 656; s. c. 34 id. 433 (see Pierce *v.* Brew, 43 id. 292); Peters *v.* Myers, 22 Wis. 602.

In nearly all of these cases the question of liability depended upon local legislation as to the time when the lien of the taxes attached, and sometimes upon the express provisions of the statute as to whether the vendor or purchaser was liable for the tax for the current year.

In Spring *v.* Tongue, 9 Mass. 28, the subject of the sale was a pew, which the seller covenanted to be free from all incumbrance. By the act of incorporation, the pews were liable for any assessment which it might be necessary to make, and the plaintiff had been obliged to pay a certain sum assessed for the deficiency of funds in building the church, the money arising from the sale of the pews not having made up the requisite amount for that purpose. The case was submitted without argument. The court briefly held: "We cannot consider this as an incumbrance

sessments which, assessed after the execution of the deed, do not so relate back,[1] or of which, if assessed but not confirmed, the amount is not ascertained or determined.[2] So where there had been a judgment for taxes and sale and tax deed, a plea that the sale was not valid was held no bar to the action.[3] So where a testator devised to his daughter the right of living in part of a house, of which the whole was afterwards sold by the residuary devisee, such paramount right was held to be a breach of the covenant against incumbrances made by the latter.[4] So where the premises sold were subject to a covenant that no ardent spirits should be sold therefrom;[5] or to a covenant that a certain fence should be erected or maintained;[6] or to a restriction against building except in a particular way;[7]—all these have been held to be breaches of the covenant.

It has been said, in several cases, that the covenant will be broken by the existence of a prior lease,[8] and this may be unquestionably true. It must be true in every case in which the

for which the defendant is liable in damages. The facts must have been equally known to each of the parties. The damage to the plaintiff arose from the diminished value of the pews in the general estimation. Had the proceeds of the sale of the pews exceeded the cost of the house, the plaintiff would have had his proportion of the benefit. The loss therefore is properly his." In Clark *v.* Perry, 30 Me. 148, the defendant conveyed to the plaintiff ten shares in an incorporated company. The assets at the time were not equal to the debts, which a general law of the State made the shares liable for, and it was held that this liability was a breach of the covenant against incumbrances, and in referring to Spring *v.* Tongue the court said, "It does not appear but that the pews at the time of the sale to the plaintiff were equal in value to the amount of the expenses. But in the present case it is stated that the assets were not equal to the liabilities at the time of the conveyance."

[1] Langdale *v.* Nicklaus, 38 Ind. 289; Tull *v.* Royston, 30 Kans. 617; Barlow *v.* St. Nicholas Bank, 63 N. Y. 399; Lathers *v.* Koegh, 46 N. Y. Supr. Ct. 576; Jackson *v.* Sassaman, 29 Pa. 109.

[2] Dowdney *v.* Mayor of New York, 54 N. Y. 186; De Peyster *v.* Murphy, 66 id. 622.

[3] Vorhis *v.* Forsythe, 4 Biss. (C. C. U. S.) 409.

[4] Jarvis *v.* Buttrick, 1 Met. (Mass.) 480.

[5] Hatcher *v.* Andrews, 5 Bush, (Ky.) 561.

[6] Burbank *v.* Pillsbury, 48 N. H. 475; (Blain *v.* Taylor, 19 Abb. Pr. (N. Y.) 228, was a case of an executory contract;) Kellogg *v.* Robinson, 6 Verm. 276; Bronson *v.* Coffin, 108 Mass. 175; Richardson *v.* Tobey, 121 id. 457. Parish *v.* Whitney, 3 Gray, (Mass.) 516, was held otherwise, on the supposed ground that the stipulation in the deed that the grantee should maintain the fence was a personal covenant, merely binding him and his representatives, but not affecting the estate. In Bronson *v.* Coffin, *supra*, it was held to bind the estate.

[7] Ayling *v.* Kramer, 133 Mass. 12; Roberts *v.* Levy, 3 Abb. Pr. (N. Y.) 311. As to easements, see *infra*, § 79.

[8] Van Wagner *v.* Van Nostrand, 19 Io. 422; (in Gale *v.* Edwards, 52 Me. 360, the lease was expressly excepted from the covenant;) Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201; Grice *v.* Scarborough, 2 Spears, (S. C.) 649.

existence of the lease, the possession under which is not apparent, did not, according to competent evidence, form part of the subject of the contract and pass to the purchaser as an incident of the reversion.[1] At the same time it must be far from having a general application. Thus where the lease was only executory and dependent for its effect upon some act of the lessor which he had never performed, it was held that there was no breach.[2] So where the purchaser received from the vendor, at the execution of the conveyance, an assignment of two prior leases of the premises and notified the tenants to pay the rents to him, the existence of the leases was obviously held to be no breach.[3]

§ 78. And it is conceived that in practice, in the ordinary case of the sale of improved property which is tenanted, and of which by the terms of the contract the rent passes with the reversion, few vendors ever dream of specially excepting the lease from the operation of a covenant against incumbrances. An apportionment is usually made, up to the date of the deed or of the delivery of possession, of the taxes, interest on incumbrances, water-rent, and the like, on the one hand, and of the rent, on the other; the former being paid by the vendor and the latter by the purchaser, to whom the tenant then attorns and pays the rent when due. Here it would seem impossible to call such a lease an incumbrance.[4] At the same time, it should be observed that in

[1] Anonymous, F. Moore's R. pl. 393; Haverington's case, Owen (temp. Eliz.), 7; Porter *v.* Bradley, 7 R. I. 538; Taylor *v.* Heitz, 87 Mo. 660. Thus, in Batchelder *v.* Sturgis, *supra*, the covenantee, having proved that the plaintiff had notice of the lease, gave in evidence a certain agreement, bearing even date with the conveyance, which he contended established an accord and satisfaction; but the court held, "If this agreement shows anything, it shows that the lease should have been exempted from the deed. But not having been exempted from the deed, the evidence was not of a character to control the legal effect and operation of the covenants in the deed." So in Grice *v.* Scarborough, *supra*, it was suggested that, if the plaintiff had acquired a title to the rent reserved on the lease, which passed to him by the deed under the statute of 32 Hen. VIII. or in analogy thereto, he could not maintain the action, as he had had the benefit of the incumbrance; but as the case was presented upon demurrer to a plea that the plaintiff had notice of the lease, judgment was of course given for the plaintiff.

[2] Weld *v.* Traip, 14 Gray, (Mass.) 330; Cross *v.* Noble, 67 Pa. 77.

[3] Pease *v.* Christ, 31 N. Y. 141. This decision might also have been obviously put on the ground of equitable estoppel; see *infra*, Ch. XI.

[4] Kellum *v.* Berkshire Ins. Co., 101 Ind. 455; Haldane *v.* Sweet, 55 Mich. 196. The doctrine that between tenants and purchasers "whoever purchases an estate from the owner, knowing it to be in the possession of tenants, is bound to inquire into the estates those tenants have," (Taylor *v.* Stibbert, 2 Ves. Jr. 437; Hall *v.* Smith, 14 id. 433; Daniels *v.* Davison, 16 id. 254; 17 id. 433,) was, in the somewhat recent case of James *v.*

case of deficiency of proof as to what was the subject matter of the contract, the vendor would be, at least so far as a technical

Lichfield, L. R. 9 Eq. 51, applied between vendor and purchaser. The purchaser filed a bill for specific performance with a deduction for compensation, on the ground that the tenant in possession had a lease for twenty-one years; and while admitting that he was aware that the tenant was in possession, alleged that until he had received the draft of the articles of sale he was not aware that the tenancy was more than from year to year, and alleged moreover that the property was in a building neighborhood, and that he bought for building purposes, to which end immediate possession was essential; but the Master of the Rolls (Lord Romilly) dismissed the bill with costs, unless the plaintiff should elect to take the property without compensation. "If the purchaser," said he, "knowing of the tenancy, is bound to inquire as regards the tenant, as to his interest in the land, and if the purchaser must be taken to be bound to know what would be the result of such inquiry as regards the tenant, why should he not be so bound as regards the vendor? And if the purchaser chooses to bind himself by agreement with this vendor, knowing of the tenancy but without having accurately ascertained what was the extent and character of it, and what the results of such inquiry would have led to, he must, as it appears to me, be bound in the same manner as regards all other persons. I think also that no distinction can properly be drawn in a court of equity on the ground that the matter rests in contract and that the conveyance of the legal estate has not been made to him. The purchaser bound himself by contract. He must be taken to have had present to his mind all those things of which he had notice, and those things which necessarily flowed from and were incidental to that notice. He knew that Allen was tenant of this land; he was bound to inquire what the tenancy was, unless he was willing to be bound by the tenancy whatever it was." This decision was approved in Phillips *v.* Miller, L. R. 9 C. P. 196, where the defendants, the owners of farm lands, contracted with their tenants to surrender possession on a certain day in consideration of payment for their hay, &c. at "market value," instead of the somewhat lower rate established for outgoing tenants by the custom of the country, and known as "fodder value." The defendants thus sold the lands to the plaintiff. In the contract of sale, the tenancies and the day fixed by the contract for their expiration were mentioned, but there was no reference to the contract and the plaintiff knew nothing about it. He afterwards obtained full information, and at the execution of the deed, which contained the usual covenant against incumbrances, it was agreed in writing that the settlement should be without prejudice to the plaintiff's claim for compensation, if he should be entitled to it, for loss he might sustain on account of the contract. The tenants surrendered possession on the appointed day, and were paid "market value" for their hay, &c. by the plaintiff, who then brought suit for compensation. "It was contended for the plaintiff," said Coleridge, C. J., delivering the opinion of the court, "that, upon the true construction of the contract, he as purchaser had not got what the vendors contracted to sell him, and that he had therefore a right to succeed on purely legal grounds; and further, that, if recourse were had to the doctrines of equity, notice in the particulars of sale that these farms were in the hands of tenants was not notice of the equities of such tenants, and that therefore, upon equitable grounds also, he was entitled to succeed. . . . In order to succeed in his legal contention, the plaintiff must establish that the true construction of the conditions in the particulars of sale is, that the farms are to be conveyed free from all claim of the tenants to be paid on the termination of their tenancies at a higher rate than fodder value; and further, that the arrangements with the tenants above set forth were not terms of the holdings or incident to them, but were in truth independent and collateral agreements as

breach was concerned, at the mercy of his purchaser, while if his only evidence were parol proof that the lease was to be excepted from the covenant, it would fall within the general principle already referred to and be unhesitatingly rejected.[1]

§ 79. Again, it has been said that the covenant is broken by

to the terms on which the tenancies should be determined, or claims and incumbrances other than any of those specified in the particulars and conditions, and which therefore the plaintiff, if he paid them, has a right in some form to recover from the vendors. Neither proposition appears to us to be established. . . . It was contended," continued the court, in regard to the equitable view of the case, "that it was the duty of the vendors to have stated the particulars of these agreements, and that, if damage accrued to the purchaser in consequence of the non-fulfilment of this duty, he could recover it from the vendors. . . . It is perhaps unnecessary, after the opinion we have expressed upon the contract itself, to decide this question. But we are not satisfied that there is any such duty as that contended for. For certain purposes and between certain parties it is clear that notice of a tenancy is notice of a tenant's equities." After reviewing the cases already cited, and quoting the opinion in James *v.* Lichfield, the court concluded, "On this state of the authorities, there would seem to be good ground for holding, if it were necessary, that there was here nothing to ground an action for damages against the vendors for any breach of duty," and judgment was entered for the defendant.

A different opinion, however, was expressed in Caballero *v.* Henty, L. R. 9 Ch. App. 447, a case decided about the same time as Phillips *v.* Miller, though neither contains a reference to the other. The owner of a public house put it up with other real estate for sale at auction. In the conditions of sale it was stated that "the properties are sold subject to the several tenancies now existing." A brewer, intending to use the house for the sale of his beer, agreed to buy it; but the contract which he signed contained no reference to a lease. He afterwards learned that the house was leased to another brewer for a term of which eight years were unexpired, and thereupon refused to complete the purchase unless the lease should be surrendered. The vendor declined to obtain a surrender, and filed a bill for specific performance. The Master of the Rolls (Sir George Jessel) dismissed the bill, and on appeal his decision was sustained, because in the signed agreement there was no reference to the lease. No room, therefore, remained for the application of the doctrine of James *v.* Lichfield, which was the main ground of the plaintiff's contention, but James, L. J., in the course of the opinion said: "There is no pretence for the case made by the plaintiff, that a person who wants to buy such property and has notice of the occupation of a tenant is bound to go and inquire of the tenant what is the nature of his tenancy. For this proposition, James *v.* Lichfield was cited as an authority. In that case there certainly are some *dicta* which nearly go to that extent, and which support the notion that the doctrine of Daniels *v.* Davison (*supra*), applies between vendor and purchaser and whilst the matter still rests in contract. It is not necessary to deal with that case, but I am not at present prepared to assent to any such proposition. The doctrine in question seems to me to refer to equities between the purchaser and the tenant when the legal estate has passed, and to have nothing to do with the rights and liabilities of vendors and purchasers between themselves. If there is anything in the nature of the tenancies which affects the property sold, the vendor is bound to tell the purchaser, and let him know what it is which is being sold; and the vendor cannot afterwards say to the purchaser, 'If you had gone to the tenant and inquired, you would have found out all about it.'"

[1] See *supra*, § 76.

the existence of any easements or servitudes to which the land is subject;[1] and as a general proposition this may be also true. Thus the existence of a paramount private right of way;[2] or, it has been held, of a right of way for a railroad;[3] a right to cut and maintain a drain,[4] or other artificial water-course;[5] a right to cut timber (or "woodleave" as it is sometimes called);[6] and in some cases, it is said, a right to dam up and use the water of a stream running through the land conveyed;[7] — all these have been held to be incumbrances within the scope of the covenant. So it has been held in New York, both as between lessor and lessee, and vendor and purchaser, that the covenant was broken by the adjoining owner having the right to use the party-wall;[8] but in a case in Iowa, between vendor and purchaser, the decision was the other way.[9]

§ 80. In such and similar cases, much will depend upon the nature of the easement. The right to draw water, or to use a party wall, is one not physically apparent,[10] though there may be obvious cases in which the physical condition might be such as to

[1] Mitchell *v.* Warner, 5 Conn. 508. The point decided in this case, however, viz. that, although a covenant may run with the land, it will not run when the breach relates to water, has been so much controverted, that it must be considered as practically overruled. See Wilson *v.* Cochran, 46 Pa. 233; and *infra*, Ch. X.

[2] Wilson *v.* Cochran, *supra;* Russ *v.* Steele, 40 Verm. 310 (in this case, though the deed contained covenants both against incumbrances and of warranty, yet the plaintiff, being an assignee of the land, could not have recovered upon the former covenant, it being broken as soon as made, see *infra*, Ch. X.; but the court considered the adverse occupation and user of the right of way as an eviction; the law was held the other way in McMullin *v.* Wooley, 2 Lans. (N. Y.), 394, as to the right to draw water from a spring); McGowen *v.* Myers, 60 Io. 256; Blake *v.* Everett, 1 Allen, (Mass.) 248; Weatherbee *v.* Bennett, 2 id. 428.

[3] Beach *v.* Miller, 51 Ill. 206; Barlow *v.* McKinley, 24 Io. 70; Kostendader *v.* Pierce, 37 id. 645; Gerald *v.* Elley, 45 id. 322; Butt *v.* Riffe, 78 Ky. 352.

[4] Smith *v.* Sprague, 40 Verm. 43.

[5] Prescott *v.* White, 21 Pick. (Mass.) 341. The distinction taken by the cases between an artificial and a natural water-course will be noticed presently; and in this case, the jury having subsequently found that the water-course was natural (Prescott *v.* Williams, 5 Met. (Mass.) 433), it was held not to be an incumbrance.

[6] Cathcart *v.* Bowman, 5 Pa. 319; Spurr *v.* Andrew, 6 Allen, (Mass.) 420; and in the latter case parol evidence was of course held inadmissible to prove that the trees were not to pass with the land; see *infra*.

[7] Morgan *v.* Smith, 11 Ill. 199; Ginn *v.* Hancock, 31 Me. 42; Rosenberger *v.* Keller, 33 Gratt. (Va.) 489.

[8] Mackey *v.* Harmon, 34 Minn. 168; Giles *v.* Dugro, 1 Duer, (N. Y.) 331; Mohr *v.* Parmelee, 43 N. Y. Super. Ct. 320; Edmund's App., 19 Weekly Notes, (Phila., Pa.) 59.

[9] Bertram *v.* Curtis, 31 Io. 46. Possibly local provisions as to party walls may reconcile these cases. The decision in Iowa seems at all events to be correct.

[10] Edmund's App., *supra*.

put a purchaser upon inquiry,[1] and come within the class of "such incumbrances as affect the title;"[2] "but when there is a servitude imposed upon the land which is visible to the eye and affects not the title but the physical condition of the property,"[3] while there is a class of cases which holds that a different rule prevails, there are others which seem to decide that even these are incumbrances. The most obvious of such servitudes are public roads or highways. It has been already said that such a way has been held to be no breach of the covenant for seisin, inasmuch as the freehold still remains in the owner of the soil, although the public may have the right of passage over it.[4] But in the early case in Massachusetts of Kellogg *v.* Ingersoll,[5] a public town road or way duly laid out "by the town of A. for the use of all its inhabitants,"[6] which was the breach assigned, was held to be an incumbrance. "It is a legal obstruction to the purchaser," said the court, per Parsons, C. J., "to exercise that domain over the land to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable, or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the

[1] Thus in the very recent case of Eddy *v.* Chace, 140 Mass. 471, land was sold "bounded southerly by the highway to land to William Mitchell's mill privilege," and in an action on the covenant against incumbrances the defendant contended that the plaintiff was fully notified of the incumbrance of the privilege by reference to it in the deed; but the court held that the descriptive part of the deed merely referred to the Mitchell land as a monument or boundary, and could not by any rule of construction be held to take the privilege out of the operation of the general covenants of the deed. On the other hand, in Patten *v.* Fitz, 138 Mass. 456, where land was conveyed with a covenant against incumbrances, and described as bounded "westerly on Austin St.," which was originally a private way, but at the instance of the grantor and upon his release of damages had been duly laid out on the city plan as a public street and at a lower grade, the court held that as Austin St. was by the deed a boundary, and its existence and grade fixed by the city, and the right to damages was personal to the grantor, neither its existence nor the grantor's release of damages was a breach of the covenant.

[2] Memmert *v.* McKeen, 112 Pa. 315.

[3] Ibid.

[4] See *supra*, § 59.

[5] 2 Mass. 101. This case, it should be observed, was decided upon a question of pleading, the defendant having in his plea alleged that the premises were free from incumbrance.

[6] It was not stated that the road was opened as well as laid out, but this would seem to be assumed by defendants' counsel, who argued, "It appears by the plaintiffs' own showing to have been a *public* town way before and at the time of making the deed. It must, therefore, have been known to the parties, and the terms of their contract were of course adapted to it."

question whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid."

§ 81. In New York, however, although the question was not directly decided in the case of Whitbeck *v.* Cook (the covenant sued upon being that for seisin), yet a strong doubt was there expressed whether a public road could properly be deemed an incumbrance;[1] while in Pennsylvania, when the question was presented in Patterson *v.* Arthurs,[2] it was decided in the negative. The court expressed its surprise that a highway should ever have been imagined an incumbrance within the covenant, and its belief that it had been the universal understanding of both sellers and purchasers in Pennsylvania that the covenant against incumbrances did not extend to public roads. "Although a public highway, no doubt, is in many instances an injury instead of a benefit to the holder or owner of the land upon which it is located, and therefore tends to lessen its value in the estimation of a purchaser, yet it is fair to presume that every purchaser, before he closes his contract for his purchase of land, has seen it and made himself acquainted with its locality and the state and condition of it; and consequently, if there be a public road or highway open and in use upon it, he must be taken to have seen it, and to have

[1] 15 Johns. 483. "It must strike any one with surprise," said Spencer, J., "that a person who purchases a farm through which a public road runs at the time of purchase, and had so run long before, who must be presumed to have known of the existence of the road and who chooses to have it included in his purchase, shall turn round on his grantor and complain that the general covenants in the deed have been broken by the existence of what he saw when he purchased, and what must have enhanced the value of the farm." And it was added, "The case of Kellogg *v.* Ingersoll has been cited to show that the existence of a town road is a breach of the covenant of incumbrances. The first answer to that case is, that the plaintiff here counts on no such contract; and the second is, that we should choose to consider the point further before we consented to the doctrine of that case." In the very recent case of Hymes *v.* Esty, 43 N. Y. Supr. C. R. 147, Whitbeck *v.* Cook, and Wilson *v.* Cochran, *infra*, p. 101, n. 3, were approvingly cited, and it was held that an injunction obtained by a village restraining a purchaser from enclosing a portion of his lot which had been dedicated by his grantor as a street, was no breach of the covenant of warranty; the opening of a public street was not a sufficient eviction. Whether such a street was a breach of the covenant against incumbrances was, the court said, a question on which the decisions of the various States do not agree, referring to 3 Washburn on Real Property (5th ed.), 491 *et seq.*

[2] 9 Watts, 152, per Kennedy, J. The case, however, was not an action brought on a covenant against incumbrances, but an action by a vendor on an executory contract for the purchase money of certain lots, covenanted to be conveyed clear of all incumbrances, and the purchaser claimed a deduction because of a public road which passed diagonally over the ends of the lots, and had been in use for thirty years.

fixed in his own mind the price that he was willing to give for the land, with a reference to the road, either making the price less or more, as he conceived the road to be injurious or advantageous to the occupation and enjoyment of the land. . . . The existence of the highway could not be regarded as an incumbrance that came within the meaning of the parties when they used the term 'incumbrances' in their contract;[1] and hence an action of covenant could not be sustained on account of it for a breach of the covenant against incumbrances."[2] The authority of this case as it was presented to the court has since been distinctly recognized in the same State;[3] and in somewhat recent cases it

[1] This, as matter of law, was perhaps a little broadly stated. It is, however, settled that the covenants for title do not extend to the acts of the State in its exercise of sovereignty. Dobbins *v.* Brown, 14 Pa. 80 (the objection to the decision in this case may be that the vendor had *released* to the State his right to compensation; see *infra*, Ch. VI.); Bailey *v.* Miltenberger, 31 id. 41; Dyer *v.* Wightman, 64 id. 427; Brimmer *v.* City of Boston, 102 Mass. 19; Cooper *v.* Bloodgood, 32 N. J. Eq. 209 (and see the reporter's note to that case); Smith *v.* Hughes, 50 Wis. 620. This is well shown by the many recent cases in which it has been uniformly held that where slaves were, prior to the late rebellion, sold with a covenant of warranty that they were slaves for life, the covenant was not broken by reason of their subsequent emancipation under the President's proclamation. Phillips *v.* Evans, 38 Mo. 314; Fitzpatrick *v.* Hearne, 44 Ala. 171; Haskill *v.* Sevier, 25 Ark. 152; Willis *v.* Haliburton, id. 173; Walker *v.* Gatlin, 12 Fla. 9; Hand *v.* Armstrong, 34 Ga. 232; Whitworth *v.* Carter, 43 Miss. 61; Osborn *v.* Nicholson, 13 Wall. (S. C. U. S.) 655.

[2] The opinion in Patterson *v.* Arthurs seems to have been largely based upon the general understanding as to this point throughout the State, and Kellogg *v.* Ingersoll was cited, and supposed to have proceeded upon a general contrary understanding; although this does not appear in that case or in the others decided in New England. But in Pennsylvania there were reasons for such an understanding, dating from the first settlement of the colony, and these are partially referred to in Wilson *v.* Cochran, *infra*.

[3] Wilson *v.* Cochran, 46 Pa. 233; s. c. 48 id. 107. Speaking of Patterson *v.* Arthurs, the court said (per Woodward, C. J.): "That was an action by a vendor for the first instalment of the purchase money of certain lots covenanted to be conveyed clear of all incumbrances, and the purchaser claimed a deduction because of a public road which passed diagonally over the ends of the lots and had been in use for thirty years. His defence was not sustained. Although this case has been severely criticised several times, and especially by Ch. J. Redfield, in Butler *v.* Gale, 1 Will. (Verm.) 742, it is not necessary for any present purpose of ours to question it, for it is broadly distinguishable from the case before us. Public roads are laid out in Pennsylvania by authority of the law, in pursuance of the authority of Penn, who established the custom of allowing to every grantee of land six acres in the hundred, as a compensation for the roads that should thereafter be opened, and they confer on the public merely a right of passage, whilst the title to the soil is left undisturbed in the owner of the land through which they pass. A purchaser who sees such a road, that has been used thirty years upon the land he is buying, has no right to consider it an incumbrance within the meaning of a covenant against incumbrances. If it is not a positive benefit to the premises, he is presumed to have estimated its disadvantages in adjusting the

has been held that a legal public highway, or a railway in actual use, is no breach of a covenant against incumbrances,[1] nor is a public or semi-public alley which is open to observation.[2]

§ 82. But whatever weight may be due to these decisions, it cannot be denied that the current of authority has set strongly the other way, and the ruling in Kellogg *v.* Ingersoll has been approved and sustained in nearly all the New England States,[3] and many others,[4] in which it appears to be definitively settled that a public highway does constitute at law a breach of this covenant. In Illinois, while these decisions have been approved, yet recent statutory enactment has provided "that no covenant of

price he has agreed to pay." So general was the understanding as to the allowance for roads, that although the Declaration of Rights in the Constitution provided that no one's property should be taken or applied to public use "without just compensation being made," it was held that an act of the legislature authorizing a turnpike company to lay out and open roads, without compensation, was no infringement of the Constitution, "such compensation having been originally made in each purchaser's particular grant." McClenachan *v.* Curwin, 3 Yeates, 373.

The more recent case of Peck *v.* Jones, 70 Pa. 83, was an action of *scire facias* on a mortgage for part of the purchase money of land which the plaintiff had conveyed with general warranty to the defendant. The affidavit of defence alleged that, before the conveyance, there had been laid out through the land a public street, which, when opened, would cause damages far in excess of the amount of the mortgage. But the court held that this was no defence, and relied on Patterson *v.* Arthurs, *supra*, which, said Sharswood, J., "expressly decides that a public road upon lots of ground which the owner had covenanted to sell and convey is not such an incumbrance as will entitle the vendee to defalk from the amount of the purchase money in an action of covenant upon the agreement of sale." This was distinctly affirmed by the same court in the very recent case of Memmert *v.* McKeen (*supra*, p. 91, n. 1). This court, however, maintains the clear distinction between servitudes which affect the title and those physically apparent. Thus in People's Savings Bank *v.* Alexander, 3 Central Reporter, 388, the purchaser resisted a bill for specific performance on the ground that, many years before, the city authorities had laid out and ordered to be opened a public street across the premises, but nothing more was done, there was no physical appearance of the street, and neither party to the contract knew of it, and the court refused specific performance and dismissed the bill, though Patterson *v.* Arthurs and the other cases were strongly relied on for the plaintiff.

[1] Scribner *v.* Holmes, 16 Ind. 142; Burk *v.* Hill, 48 id. 52; Kutz *v.* McCune, 22 Wis. 628; Smith *v.* Hughes, 50 id. 620.

Of course a public highway which is one of the boundaries of land conveyed is not an incumbrance on the land. Frost *v.* Angier, 127 Mass. 212; Patten *v.* Fitz, 138 id. 456; King *v.* St. Patrick's Cathedral, 50 N. Y. Sup. Ct. 406.

[2] Haldane *v.* Sweet, 55 Mich. 196.

[3] Herrick *v.* Moore, 19 Me. 313; Haynes *v.* Young, 36 id. 557; Pritchard *v.* Atkinson, 3 N. H. 335; Butler *v.* Gale, 1 Will. (Verm.) 742; Parish *v.* Whitney, 3 Gray, (Mass.) 516; Hubbard *v.* Norton, 10 Conn. 422. The language of the court in this last case was cited at length in the fourth edition of this treatise, p. 104.

[4] Desvergers *v.* Willis, 56 Ga. 515; Burk *v.* Hill, 48 Ind. 52; Kellogg *v.* Malin, 50 Mo. 496, where the subject was elaborated; s. c. 62 id. 429; Jordan *v.* Eve, 31 Gratt. (Va.) 1.

warranty shall be considered as broken by the existence of a highway on the land conveyed, unless otherwise particularly specified in the deed;" [1] and in Vermont also it is provided that "where real estate is conveyed by deed, the existence of a public highway over or upon any part of such estate shall not be treated as a breach of the covenant of seisin [2] or warranty, or any covenant against incumbrances contained in such deed, unless the parties to such deed expressly refer to, and covenant against, such highway." [3] In the former State, this doctrine has also been held to apply where the incumbrance complained of was the right granted to a railway company to construct their road across the land conveyed,[4] a right to overflow the land,[5] or the like.

§ 83. The partial variance of decision which thus exists with respect to highways has been extended to another class of easements, viz. those connected with certain rights of water.

The existence of a paramount right to take water from a spring upon the land conveyed, and the incidental right of way over the land, have obviously been held to be incumbrances.[6] So of the right to dam up and raise the water in a branch of a stream running across the land,[7] and to erect and maintain a dam with sluices.[8]

[1] Rev. St. 1883, p. 286.

[2] It has, however, been considered that the existence of a highway is no breach of the covenant for seisin, since although the public may have a right of passage over the way, the freehold technically remains in the owner of the soil. See *supra*, Ch. III. § 59.

[3] Rev. Laws, 1880, p. 586.

[4] Beach *v.* Miller, 51 Ill. 206. The defendant had granted a right of way to a railroad company, and the road was built and in operation across the land when it was conveyed to the plaintiff. "Was this right of way," said the court, "an incumbrance upon the land? We think it was. It is true, the authorities on this question are not harmonious, but we think the current holds such an easement to be an incumbrance, and that they are supported by the better reason. . . . If, then, a private or public way is an incumbrance, and we have seen that it is, it follows that in principle a turnpike or railway, legally located and running over a piece of land, upon the same ground, and for the same reasons, must be held to be an incumbrance, as it in an equal or greater degree obstructs or incumbers the free use of the land. And a person selling land thus incumbered, and covenanting that it is not, must be held to perform his covenant by its removal, or respond in damages."

[5] Patterson *v.* Sweet, 3 Bradw. (Ill.) 550. The grantor, while holding the equitable title only, conveyed to a third party a right to flow a portion of the land, and, after acquiring the legal title, conveyed the fee to the plaintiff. The land was actually flooded, but whether before or after the conveyance to the plaintiff does not appear from the report.

[6] Harlow *v.* Thomas, 15 Pick. (Mass.) 66; Morgan *v.* Smith, 11 Ill. 194; Mitchell *v.* Warner, 5 Conn. 497; Lamb *v.* Danforth, 59 Me. 322.

[7] Morgan *v.* Smith, Lamb *v.* Danforth, *supra*.

[8] Ginn *v.* Hancock, 31 Me. 42.

But in a case in Massachusetts, it was considered first, that the existence of the right of a mill-owner above the land conveyed to have a natural stream of water pass freely over the land below, was not itself an incumbrance; and secondly, that this right drew with it the incidental one to enter on the land below and remove obstructions.[1] In a later case, where an upper and lower mill and dam had been conveyed by their owner to different parties, the existence of the lower dam, with the right of raising water by it to the height at which it stood at the time of the conveyance, was held to be no breach of the covenant against incumbrances contained in the conveyance of the upper mill.[2] And the rule in regard to the flowage of land for mill purposes seems to be that the statutory right to damages passes to successive owners of the flowed land as an incident of their estate, but that the flowage is not an incumbrance until the right to damages is legally extinguished by assessment and payment, grant, prescription, or the like.[3]

[1] Prescott *v.* Williams, 5 Met. (Mass.) 429; though it was also said that the exercise of this incidental right was to be confined within the strictest limits compatible with the enjoyment of the principal easement.

[2] Cary *v.* Daniels, 8 Met. (Mass.) 466.

[3] In Fitch *v.* Seymour, 9 Met. (Mass.) 462, it was considered that by the local mill acts (as to which see also Ballard *v.* Ballard Vale Co., 5 Gray, (Mass.) 468) a right was given to flow land for working a mill; that the law did not regard this as an incumbrance so long as a right to compensation existed, and as that right to compensation had not been, in that case, validly released by the covenantee, by reason of its being by parol, it still existed, and the easement itself was, therefore, no incumbrance. "Strictly speaking," said the court, "the right given by the mill acts to the mill-owner is not that of flowing, or making any other direct use of his neighbor's land adjacent to the stream above his own, but only to raise a dam on his own land to a height sufficient to raise a suitable head of water, and to continue the same to his own best advantage, although the land of another is thereby flowed. We do not, however, mean to say that a right to keep up such head of water, without payment of damages, may not, under some circumstances, be an incumbrance on the land." In the later case of Craig *v.* Lewis, 110 Mass. 377, it was held that an unsealed receipt given by the owner of flowed land to the owner of the dam, acknowledging "full payment of all dues or demands for damage," and "discharging him from all liability for any flowage," did not estop a subsequent owner of the flowed land, whose deed from the original owner contained a covenant against incumbrances except the right of flowage and a declaration that no such right was admitted, from recovering from the owner of the dam, by statutory proceedings, damages for flowage after the date of the deed; and the court said: "The right of flow for mill purposes . . . is given by statute, and there is left in the land-owner only a claim for damages, to be ascertained and enforced in proceedings under the mill act; a claim for money only, which may be satisfied or released by parol, and which, so far as concerns present owners, is a mere personal right. But this right to damages passes to each successive owner of the land as an incident of the real estate until it has been extinguished. It may be barred by grant of the owner executed with due formality, giving the right to flow permanently without compensation. It may be lost by pre-

An examination of the cases in Massachusetts, as also in Maine, Wisconsin, and perhaps some other States, would seem to show that they were, at least to some extent, based upon local statutes relating to mills and mill streams,[1] and that they do not extend to easements in general.[2]

§ 84. However this may be, the doctrine of these cases, in their broader signification, has been adopted elsewhere. Thus in New Hampshire the respective owners of the upper and the lower land constructed by agreement an artificial raceway, shortening the courses of a brook which flowed through their lands, and the lower owner afterwards conveyed to the upper owner, and the plaintiff, then being the owner of both the parcels, conveyed part of the lower land to a third party, referring to both the raceway and the brook as monuments, it was held in a very elaborate opinion that the plaintiff's covenant against incumbrances did not prevent him from recovering damages against

scription. And the assessment and payment of gross damages in proceedings under the mill act will without doubt extinguish the future right, and to that extent charge the land with an incumbrance." And in the very recent case of Isele *v.* Arlington Savings Bank, 135 id. 142, the court held that a settlement by agreement under seal, duly recorded, between the owner of the flowed land and the owner of the dam, to the effect that all subsequent owners of the land should be barred from suing for damages under the mill acts by reason of such flowage, created an incumbrance which was a breach of the covenants against incumbrance and of warranty in a subsequent conveyance of the flowed land; and Devens, J., delivering the opinion of the court, said: "The act of the mill-owner in flowing the land above him is the exercise of a statutory right, and it is equally a statutory right that the owner for the time being of the land flowed shall have compensation therefor. The right to damages, when this statutory right of flowing is exercised, passes to each successive owner of the land, as an incident to the real estate, until it has been legally extinguished. If a proprietor deprives his estate of this incident, as he may do, and then sells it, he has incumbered it by his own act."

[1] See Gould *v.* Boston Duck Co., 13 Gray, (Mass.) 442.

[2] Thus, in Carbrey *v.* Willis, 7 Allen, (Mass.) 364, it was said: "It is a familiar principle, that in a grant of a messuage, a farm, a manor, or a mill, many things will pass which have been used with the principal thing as parcel of the granted premises, which would not pass under the grant of a piece of land by metes and bounds. In such cases, it is only a question of the construction of the terms of description. But where there is a grant of land by metes and bounds, without express reservation, and with full covenants of warranty against incumbrances, we think there is no just reason for holding that there can be any reservation by implication, unless the easement is strictly one of necessity. Where the easement is only one of existing use and great convenience, but for which a substitute can be furnished by reasonable labor and expense, the grantor may certainly cut himself off from it by his deed, if such is the intention of the parties. And it is difficult to see how such an intention could be more clearly and distinctly intimated than by such a deed and warranty."

the defendant, who, claiming under the plaintiff's grantee, had erected a railroad and embankment across the watercourse to the plaintiff's damage; it being considered that nothing which constitutes a part of the estate, or which, as between the parties, is to be regarded as an incident to which the estate is subject, can be deemed an incumbrance.[1]

So in Vermont, where S., who owned a mill-pond and surrounding lands parts of which were sometimes flooded, sold to the plaintiff's grantor parcel of this land adjacent to and not bounded by the pond, by deed containing a covenant against all incumbrances, it was considered that while S. owned all the land the idea of any *easement* could not attach to such a treatment and use of the stream of water relatively to the adjacent land; that the land, with the stream and use of it as a water privilege, constituted an entire estate, and the dam and the use of it were parcel of it, and neither an easement nor an incumbrance; and that the deed from S. did not divest him of his right to flood the land otherwise than might consequentially result from his covenant against incumbrances, but "such covenant has relation to rights existing in, or in relation to, the property conveyed, appertaining to parties *other than* the grantor, and which may be claimed and exercised and enforced upon and against such property, as against such grantor and his assigns."[2]

So in a somewhat recent case in Wisconsin, where the land conveyed had been, for a time long enough to create a prescriptive right, flooded by a mill-pond created by a dam on other adjoining property, it was held that this right of flooding was not an incumbrance within the covenant; that purchasers of property, which

[1] Dunklee *v.* Wilton Railroad Co., 4 Fost. (N. H.) 489.

[2] Harwood *v.* Benton, 32 Verm. 724. "It is obvious," continued Barrett, J., who delivered the opinion, "that, in this sense, no such incumbrance existed upon the property now owned by the plaintiff, while the title to it was in Safford. Of course, then, at the moment of passing the title and making the covenant by the delivery of the deeds, the property was free from incumbrance, and so there could not have been a breach at that time, in virtue of the state of the title to, or of rights then existing in or in respect to said property. Is it matter of legal intendment that the grantor should, by force of such covenant, be estopped from exercising any right which, if it had existed in and been exercised by a third person, prior to said conveyance by Safford, would have constituted an incumbrance? So to hold would seem to be giving to such a covenant a scope and effect beyond what has been regarded as its ordinary and legal limits, and no precedent or authority has been cited to justify us in so holding." See also Swasey *v.* Brooks, 30 Verm. 692; s. c. 34 id. 451, overruling in part Vermont R. R. *v.* Hills, 23 id. 681.

was obviously and notoriously subject at the time to some easement or servitude affecting its physical condition, take it subject to such right, without any express exceptions in the conveyance, and that the vendors are not liable on their covenants by reason of its existence;[1] and in a later case the same doctrine was applied to railways and other highways.[2]

In a somewhat recent case in Maryland, the owner of two adjoining lots leased the east lot for a renewable term of ninety-nine years, and covenanted that the lessee should have the right to open certain windows deriving their light from the west lot; he subsequently conveyed the latter with a covenant of warranty against his own acts,[3] and in an action brought by its purchaser it was held that the existence of the windows and the right to their continuance were not a breach of the covenant.[4]

§ 85. In considering these cases which thus decide that such easements as highways and rights of water and light are not so to be deemed incumbrances, they seem to proceed upon the ground that such easements are always impliedly reserved in favor of the grantor whenever the burden is apparent and necessarily results from the situation of the property; in other words, that the generality of the covenant is limited and qualified by

[1] Kutz *v.* McCune, 22 Wis. 628.

[2] Smith *v.* Hughes, 50 Wis. 620, *supra*. The contrary doctrine as to highways has been stated, *supra*, § 80 *et seq.*

[3] So far as respects the point decided in this case, the covenant of warranty was the same as the covenant against incumbrances.

[4] Janes *v.* Jenkins, 34 Md. 1. "The question," said the court, "depends upon the apparent and ostensible condition of the property at the time of sale. And as the wall had been erected, and the lights therein were plainly to be seen, when the appellant purchased the property overlooked by them, it is but rational to conclude that he contracted with reference to that condition of the property, and that the price was regulated accordingly. The parties, in the absence of anything to the contrary, are presumed to have contracted with reference to the then condition and state of the property; and if an easement to which it is subject be open and visible, and of a continuous character, the purchaser is supposed to have been willing to take the property, as it was at the time, subject to such burden. That being so, the covenants in the deed must likewise be construed with reference to the condition of the property at the time of conveyance. The grantor, by his covenant, warranted the premises as they were, and by no means intended to warrant against an existing easement, which was open and visible to the appellant, and over which the former had no power or control whatever. To construe the covenant to embrace such subject would most likely defeat the understanding and intention of the parties, certainly of the grantor." And the case of Patterson *v.* Arthurs, 9 Watts, (Pa.) 152, *supra*, § 81, was cited and approved. This decision has been criticised (11 Amer. Law Register, N. S., Jan., 1872, p. 31), but it is only a logical extension of the doctrine of James *v.* Lichfield, L. R. 9 Eq. 51, *supra*, p. 95, n. 4, and must stand or fall with the authority of that decision.

the nature of the estate conveyed.[1] The question, moreover, whether the easement is or is not an incumbrance, is regarded by the cases on both sides as exclusively one of law, to be determined as *an abstract proposition* by the court. And so in fact it must be, if the rights of the parties are absolutely fixed by the terms of the deed. But if the court be at liberty to seek for the intention of the parties *dehors* the deed by reference to physical or supposed notorious incidents of the land, the question would seem to extend beyond one of mere construction of a written instrument, and the fact that parol evidence is admissible to some extent to explain what was *the subject of the contract* does not lessen the power of the court to determine what is an incumbrance within the intention of the parties. And in the nature of things it would seem that such questions cannot always be mere abstract ones. Such incumbrances as leases have already been referred to.[2] They may be benefits and they may be burdens. So with respect to buildings; in most cases they add to the value of the land,[3] and yet if bought for purposes of improvement their removal must cause expense. But no breach of a covenant against incumbrances was ever assigned by alleging that the land was in part covered by buildings, which passed with the land to the purchaser.

Instead, therefore, of laying down an abstract rule, it would seem that in a certain class of cases the question of what is or is not an incumbrance should, as has been already said, be determined by reference to the subject-matter of the contract, the relation of the parties to it and to each other, the notice on the part of the purchaser and to some extent the local usage and habit of the country; and when these facts are found by the jury, it will be the province of the court to determine whether the easement did or did not constitute an incumbrance, subject always, in case of doubt, to the application of the maxim, *Verba cartarum fortius accipiuntur contra proferentem.*[4]

[1] As to this, see *infra*, Ch. V.

[2] *Supra*, § 77.

[3] And, as has been already seen, the removal by paramount right of a house or other fixture has been held to be a breach of the covenants for seisin and of warranty; *supra*, § 58.

[4] *Supra*, § 76. As was said in Wilson *v.* Cochran, 48 Pa. 112, "It is suggested that this mode of ruling the case is virtually impairing a written covenant by parol evidence. Not at all. The subject matter of the conveyance, its condition and peculiarities, may be explained by parol without any contradiction of a deed. Do we contradict the

§ 86. It was observed in the chapter on the Covenant for Seisin, that in the pleadings on that covenant it was unnecessary for the plaintiff to specify the paramount title, or indeed refer to it in any way, either in the declaration or replication. A different rule, however, prevails with respect to the covenant against incumbrances. It is not sufficient that the plaintiff negative the words of the covenant generally; he takes upon himself the responsibility of proving the incumbrance, and must set it forth in his declaration. A contrary rule would oblige the defendant to prove a negative.[1] It is not, however, necessary or prudent, either in suing upon this covenant or upon that for quiet enjoyment or of warranty, that the incumbrance or paramount title should be set forth more than substantially, since if it were particularly alleged, and being so alleged were traversed, the plaintiff might not have the means of proving it exactly.[2]

The damages should, however, be laid with reasonable certainty;[3] for as the general rule is that the mere existence of the

conveyance of a tract of land when we permit it to be proved by parol that it is covered with timber, or is an improved farm, or contains a water-power, or has a private road upon it? If a vendee means to exclude proof upon such subjects, he should take a more special covenant than a general warranty of title."

[1] Dummer *v.* Birch, 1 Com. 146; Kent *v.* Cantrall, 44 Ind. 452; Jerald *v.* Elley, 51 Io. 321; Marston *v.* Hobbs, 2 Mass. 437; Bickford *v.* Page, id. 461; Shelton *v.* Pease, 10 Mo. 473; De Forest *v.* Leete, 16 Johns. (N. Y.) 122; Kennedy *v.* Newman, 1 Sandf. Sup. C. R. (N. Y.) 187; Vorhis *v.* Forsythe, 4 Biss. (C. C. U. S.) 409; Mills *v.* Catlin, 22 Verm. 106.

[2] 2 Wms. Saunders, 181 *a*, note 10; Foster *v.* Pierson, 4 Term, 6 7; Young *v.* Raincock, 7 Com. Bench, 310; Morgan *v.* Smith, 11 Ill. 200; Blake *v.* Everett, 1 Allen, (Mass.) 248; Duval *v.* Craig, 2 Wheat. (S. C. U. S.) 45.

[3] Tufts *v.* Adams, 8 Pick. (Mass.) 549; De Forest *v.* Leete, 16 Johns. (N. Y.) 122; Funk *v.* Voneida, 11 Serg. & Rawle, (Pa.) 109; Pillsbury *v.* Mitchell, 5 Wis. 22. The following form is given in 2 Greenleaf on Evidence, § 244: "The declaration by a grantee by deed of bargain and sale, against his grantor, for breach of the covenant of freedom from incumbrance by the existence of a paramount title, is in this form: '—— in a plea of covenant; for that the said defendant, on the —— day of —— by his deed (if by indenture it should be so set forth) duly executed, acknowledged, and recorded, and by the plaintiff now here produced in court, for a valuable consideration therein mentioned, bargained, sold, and conveyed to the plaintiff (here describe the premises), to have and to hold the same with the appurtenances to the plaintiff, and his heirs and assigns forever; and therein, among other things, did covenant with the plaintiff that the said premises were then free from all incumbrance whatsoever. Now the plaintiff in fact says that, at the time of making the said deed, the premises aforesaid were not free from all incumbrance; but, on the contrary, the plaintiff avers that, at the time of making said deed, one E. F. had the paramount and lawful right and title to the said premises; by reason whereof the plaintiff has been obliged to expend, and has expended, a great sum of money, to wit, the sum of ——, in extinguishing the said paramount

incumbrance, without more, will entitle the plaintiff to but nominal damages,[1] the familiar rule applies that where damage does not *necessarily* arise from the act complained of the plaintiff must, to prevent surprise, state the particular damage sustained or he will not be permitted to give evidence of it on the trial.[2]

and lawful right and title of the said E. F. to said premises.'" The above form is, however, very concise. Others more elaborate will be found in 2 Chitty's Pleading, 548–559; 5 Wentworth's Pleading, 53, 63; and in Carter *v.* Denman, 3 Zab. (N. J.) 273, is a very carefully drawn declaration, where the incumbrance was a right of dower which had been extinguished by the plaintiff. The form will of course vary with the nature of the incumbrance and the manner in which the damages have been sustained. If the covenant be limited to the acts of the grantor, the declaration must, of course, show that the incumbrance was made or suffered by him, otherwise it will be bad on demurrer; Mayo *v.* Babcock, 40 Me. 142; Harry *v.* Anderson, 13 C. P. (U. C.) 476; Silverthorne *v.* Lowe, 40 Q. B. id. 73.

It has been held in Connecticut, that an amendment of a declaration, by adding a count setting forth a new and distinct incumbrance, is not objectionable as changing the ground of action, within the statute which authorizes amendments which do not change the form or ground of action. Spencer *v.* Howe, 26 Conn. 200.

There are cases where the plaintiff has extinguished the incumbrance *after suit brought*, and been held entitled to recover the amount paid for that purpose. Kelly *v.* Low, 18 Me. 244; Foote *v.* Burnet, 10 Ohio, 317; Brooks *v.* Moody, 20 Pick. (Mass.) 475; Moseley *v.* Hunter, 15 Mo. 322. In a case in the Queen's Bench the plaintiff declared on the breach of an agreement to assign a lease and alleged that he had been "put to great expense, amounting to a large sum of money," &c., in investigating the title. On the trial, it appeared that he had not paid the bill of costs until after suit brought, but it was, nevertheless, held that he was entitled to recover. "If," said Lord Denman, "a plaintiff chooses to allege in his declaration that he had paid money, he must prove that he had paid it; but if he merely says that he has been 'put to expense,' the allegation is satisfied by proof that he has incurred a liability to pay." Richardson *v.* Chasen, 10 Q. B. 756.

In Boyd *v.* Bartlett, 36 Verm. 1, the plaintiff, in his original declaration, averred that the defendant covenanted that there were no incumbrances, and assigned as a breach that there was a mortgage on the property at the time of the conveyance by the defendant to one of the grantors of the plaintiff. To this the defendant demurred, and the court sustained the demurrer. Subsequently the plaintiff, with leave of the court, amended his declaration by adding a count based on the covenant of general warranty, and assigned the said mortgage as a breach; and it was held that the amendment was properly allowed, as the cause of action in the two counts was the same. In this case the plaintiff relied on a mortgage as being a breach of the covenant of general warranty, and the defendant by demurring admitted that it was a valid incumbrance. So the only question was, whether a proper eviction had been shown by the pleadings. The case seems to be not very clearly reported.

[1] See *infra*, Ch. IX.

[2] 1 Chitty's Pleading, 338; Pillsbury *v.* Mitchell, 5 Wis. 22. In Massachusetts, and perhaps some other States, there are statutory forms of pleading. Thus in the Mass. Pub. Stat., 1882, p. 977, § 94:—

"Forms of declarations by grantee against grantor in a common deed of warranty for breaches of covenant:

"And the plaintiff says the defendant delivered to him a deed, a copy whereof is hereunto annexed:

"And the defendant was not seised in fee of a part of the land described as follows (describing it), but the same was held adversely by one L. M.; and the residue of said land was not free from

The damage may arise in various ways. The purchaser may be obliged to extinguish the incumbrance, or he may be evicted under it, or the land may be sold under a subsequent incumbrance, when if the amount of the former one be paid out of the proceeds of sale it will by so much diminish the amount coming to the plaintiff.[1]

§ 87. As respects the burden of proof, this rests, in the first instance, upon the plaintiff.

§ 88. In case there are known incumbrances of any kind subject to which the purchaser agrees to take the property, these should, for every reason, be specially and expressly excepted from the operation of the covenant.

They should be excepted for the protection *of the vendor*, for if not so excepted the fact of their being known to the purchaser will be no bar to his recovery upon the covenant.[2] Thus in the old case of Levit *v.* Witherington, a grantor covenanted that a lease was good and unincumbered, and to the declaration alleging an incumbrance the defendant pleaded that the plaintiff had notice of it, which was held bad on demurrer.[3] This decision has been often recognized and followed,[4] and it must be consid-

incumbrances, but was subject to a mortgage to one S. T. to secure the payment of six hundred dollars :

"And the defendant has not warranted and defended the premises against the rightful claims of all persons, but one W. S. had a right of dower therein, and has compelled the plaintiff to assign the same to her."

[1] Haire *v.* Baker, 1 Seld. (N. Y.) 361. Thus, in Funk *v.* Voneida, 11 Serg. & Rawle, (Pa.) 109, when the fact of the existence of a mortgage on the premises of the purchaser got to be publicly known, his creditors, becoming anxious for their security, pressed him, and the property was sold at a sacrifice, and the court said, "If the plaintiff had laid the consequential damages he offered to prove, the evidence should have been received ; but as they were not laid, and not confessed by the plea of covenants performed, it is evident the evidence was properly overruled. If he had discharged the mortgage, this ought to have been stated as the actual *gravamen*. So if by a judicial sale he had sustained, as was alleged, the ultimate damage which he ever could have sustained, this *gravamen* ought to have been laid."

[2] That is to say, if the alleged incumbrance be really an incumbrance, as to which, as has been seen, the question of notice may be very material. See *supra*, § 76.

[3] Levit *v.* Witherington, Lutwyche, 317. (This reference is to the French folio of 1704. In Nelson's translation (8vo, 1718) the case is omitted.)

[4] Funk *v.* Voneida, 11 Serg. & Rawle, (Pa.) 112 ; Hubbard *v.* Norton, 10 Conn. 431 ; Snyder *v.* Lane, 10 Ind. 424 ; Grice *v.* Scarborough, 2 Spears, (S. C.) 649. In the last two cases a plea of the plaintiff's notice of the incumbrance was held bad on demurrer. "It is no answer to the purchaser's complaint," said Duncan, J., in Funk *v.* Voneida, *supra*, "to say it was his duty to search the record, and to have protected himself by some special covenant against this specific incumbrance. It was no part of this case that he had actual notice, but if he had, it could

ered as settled that mere notice of an incumbrance cannot affect the right of recovery upon the covenant.[1] It is evident that the only presumption to be drawn from the purchaser's notice is that he agreed to run the risk of the incumbrance, or, in other words, that the incumbrance was intended to be excepted from the operation of the covenant; but if this be really so, it is in the power of the vendor to insert this in the deed, and if he neglect to take this precaution, he cannot be allowed to repair his carelessness at the expense of settled principles. If indeed the agreement of the parties has been improperly or imperfectly set forth in the conveyance, the familiar jurisdiction of equity in the reformation of deeds on the grounds of fraud and mistake may be successfully resorted to;[2] or if the omission has been occa-

make no difference. The purchaser covenanted against all incumbrances. The rule as to the vendee is *caveat emptor*. So let the vendor take care of the covenants he enters into. Notice of the mortgage would make no difference, as was determined in Levit *v.* Witherington." So in Hubbard *v.* Norton, *supra*, it was said, "How can the plaintiff's knowledge destroy the effect of the defendant's covenant? Suppose the defendant had sold a farm which he and the purchaser both knew they did not own, could that knowledge destroy or affect the nature of the covenant for seisin? If not, by what rule can such knowledge impair a covenant of warranty against incumbrances?" or, as was lately said in Smith *v.* Lloyd, 29 Mich. 382, "It is as usual, and certainly as competent, to covenant against *known* as unknown incumbrances or defects of title, and with this covenant the purchaser was not called upon for the exercise of any diligence."

[1] Dunn *v.* White, 1 Ala. 645; Worthington *v.* Curd, 22 Ark. 285; Hubbard *v.* Norton, 10 Conn. 422; Wadhams *v.* Innes, 4 Bradw. (Ill.) 642; Morgan *v.* Smith, 11 Ill. 200; Medlar *v.* Hiatt, 8 Ind. 173; Snyder *v.* Lane, 10 id. 424; Van Wagner *v.* Van Nostrand, 19 Io. 427; Barlow *v.* McKinley, 24 id. 70; Gerald *v.* Elley, 45 id. 322; Harlow *v.* Thomas, 15 Pick. (Mass.) 70; Ladd *v.* Noyes, 137 Mass. 151; Williamson *v.* Holt, 62 Mo. 405; Close *v.* Graham, 64 id. 249; Sargent *v.* Gutterson, 13 N. H. 473; Good *v.* End, 1 Allen, (N. B.) 603; Van Winkle *v.* Earl, 26 N. J. Eq. 242; Suydam *v.* Jones, 10 Wend. (N. Y.) 185; Gragg *v.* Wagner, 7 N. Car. 316; Lloyd *v.* Quimby, 5 Ohio, 265; Grice *v.* Scarborough, 2 Spears, (S. C.) 654; Perkins *v.* Williams, 5 Cold. (Tenn.) 513; Taylor *v.* Gilman, 25 Verm. 413; and see also the cases cited *infra*.

But as will be hereafter seen, although the purchaser's notice of an incumbrance or defect is no bar to his recovery at law on the covenant, it will afford a ground for refusing him relief in equity as to detaining the unpaid purchase money. Worthington *v.* Curd, *supra*. See *infra*, Ch. XIV.

In Roberts *v.* Levy, 3 Abbott's Pract. R. N. S. (N. Y.) 316, a distinction was suggested between actual and constructive notice; and while the court were clear that constructive notice would not defeat a recovery, it seems to have been thought that proof of actual notice might be received in mitigation of damages. But it is submitted that the evidence, if admissible at all, must be to prove that the particular incumbrance *formed no part of the contract*, and hence there could be no recovery for a breach of it.

[2] Van Wagner *v.* Van Nostrand, 19 Io. 427; Metcalf *v.* Putnam, 9 Allen, (Mass.) 99; Busby *v.* Littlefield, 11 Fost. (N. H.) 199; Haire *v.* Baker, 1 Seld. (N. Y.) 360; Taylor *v.* Gilman, 25 Verm. 413; Butler

sioned by fraud, he may have a remedy at law by an action on the case in the nature of a writ of deceit;[1] but every court of law which enforces the rule that parol evidence is not admissible to control or contradict the effect of written instruments must, in an action on the covenant against incumbrances, exclude evidence to show that it was the agreement of the parties that the covenant was not to extend to a particular incumbrance not expressly excepted from its operation.[2]

v. Gale, 27 id. 744; Stanley *v.* Goodrich, 18 Wis. 505; and see notes to Woollam *v.* Hearne, 2 Leading Cases in Equity (4th ed.).

[1] Sargent *v.* Gutterson, 13 N. H. 473; Funk *v.* Voneida, 11 Serg. & Rawle, (Pa.) 112.

[2] Wadhams *v.* Innes, 4 Bradw. (Ill.) 642; Morehouse *v.* Heath, 99 Ind. 509; Bever *v.* North (Ind.), 8 N. E. Rep. 576; Van Wagner *v.* Van Nostrand, 19 Io. 428; Johnson *v.* Walker, 60 id. 315; Donnell *v.* Thompson, 1 Fairf. (Me.) 177; Townsend *v.* Weld, 8 Mass. 146; Harlow *v.* Thomas, 15 Pick. (Mass.) 70; Batchelder *v.* Sturgis, 3 Cush. (Mass.) 203; McLeod *v.* Skiles, 81 Mo. 595; Suydam *v.* Jones, 10 Wend. (N. Y.) 185; Long *v.* Moler, 5 Ohio, 271; Collingwood *v.* Irwin, 3 Watts, (Pa.) 306; McKennan *v.* Doughman, 1 Pa. (old Pa., not Pa. St.) 417; Grice *v.* Scarborough, 2 Spears (S. C.) 649; Bigham *v.* Bigham, 57 Tex. 238; Buckner *v.* Street, 5 McCrary, (C. C. U. S.) 59. In Collingwood *v.* Irwin, *supra*, the covenantor offered to show that at the time of the execution of the deed it was agreed that the assignment of a certain judgment should be the only security of the covenantee, and that the former was not to be held liable on his covenant. But the court said, "It is impossible to avoid seeing that to admit such proof would not only be admitting evidence to contradict, but to alter and change most materially, the character and effect of the deed. Instead of being a deed with covenant of general warranty, as it purports on its face, it would, by the operation of the evidence proposed to be given, become a deed without any engagement whatever on the part of the grantor for the goodness of the title. It is not pretended that there was any mistake or fraud committed in introducing the covenant of general warranty into the deed; the evidence, therefore, is not offered with a view to obtain relief from the one, nor the purpose of correcting the other. The evidence offered then being oral, falls directly within the general rule that it shall not be admitted to contradict, alter, or vary the written agreement between the parties to it. The court was therefore right in rejecting it." It is true that in Leland *v.* Stone, 10 Mass. 459, it was held that evidence was admissible, *in mitigation of damages*, to show that part of the land had been included by mistake in the deed; that the purchaser had paid nothing for it; and that the prior grantee had long been in notorious and exclusive possession; and this was thought to present "a case for the equitable consideration of the jury." Upon the authority of this case, the Supreme Court of Illinois went a little farther, and decided (as had also been held in Indiana, see *infra*) that parol evidence may, *in bar of a recovery*, be given to show that the purchaser agreed to take the property subject to certain incumbrances which were not excepted from the covenants or in any way mentioned in the deed. Sidden *v.* Riley, 22 Ill. 111. But more recently in Massachusetts the same point was decided the other way, in Harlow *v.* Thomas, 15 Pick. 66; and although Leland *v.* Stone was not then overruled, yet in the subsequent case of Spurr *v.* Andrew, 6 Allen, 422, the court, referring to Leland *v.* Stone, said of it: "So far as that case may be supposed to infringe upon the rule excluding oral evidence, when offered to control or contradict the deed itself as the proper evidence of the contract between

It has moreover been said, that the fact of the purchaser having notice of an incumbrance is the very reason for his taking a

the parties, it is not to be extended. Under the equity powers conferred upon this court, full opportunity is afforded for parties aggrieved by the fact that their contracts, as drawn and executed, were the result of accident or mistake, and not such as to give effect to the real contract intended to be made, to apply to this court to have the same reformed and corrected. In that way, proper relief may be granted." And in Illinois, in the recent case of Wadhams *v.* Innes, 4 Bradw. 642, the court, though expressly distinguishing the facts, virtually abandoned the doctrine of Leland *v.* Stone.

In the preceding cases, parol evidence was held inadmissible on the part of the covenantor to show that an incumbrance which, on the face of the deed, was included within the covenant, was in fact intended to be excepted from it, and the converse of the proposition is of course equally true ; and an incumbrance which, on the face of the deed, is excepted from the covenant, cannot be shown by parol to have been intended to be included within it ; and it has consequently been held that an action of assumpsit cannot be sustained upon a parol promise alleged to have been made at the execution of a deed containing covenants limited to the acts of the grantor, whereby the latter agreed to discharge an incumbrance *not* created by himself, and therefore not within the covenant ; Howe *v.* Walker, 4 Gray, (Mass.) 318 ; Duncan *v.* Blair, 5 Denio, (N. Y.) 196 ; or upon an alleged parol warranty of quantity of land conveyed, Cook *v.* Coombs, 39 N. H. 597 ; or of timber growing on it, Powell *v.* Edmunds, 12 East, 6. So in Patterson *v.* Yancy, 81 Mo. 379, it was obviously held that, in an action of debt to recover money paid for taxes claimed to be an incumbrance, parol evidence was inadmissible to show what were the covenants in the deed.

In Indiana, the rule excluding parol evidence is not strictly enforced, and the doctrine that an existing incumbrance may be thus proved to have been within or without the covenant is established in a long line of decisions, beginning with Allen *v.* Lee, 1 Ind. 58, where evidence was held admissible to show that at the time of the execution of the deed the vendor said that the purchaser was to take the land with the incumbrance of a lease for life, and that he thought it should be so mentioned in the deed, but that the purchaser replied that he knew that such was the contract, but it was unnecessary to mention it in the deed, as he was about to undertake to keep the tenant for life, and wished to have the whole title in himself. Smith, J., in delivering the opinion of the court, said, somewhat more broadly than was necessary, "A general covenant of warranty does not, at least conclusively, extend to such incumbrances as were known to the purchaser at the time of the contract, and which he agreed to pay or discharge himself, in addition to or as part of the consideration money from him to the vendor ; and where the question is, as in this case, what was the true consideration paid for the land, we think such facts may be given in evidence without in any manner contradicting the terms of the written warranty." Though this case was not a suit upon the covenant, but the defence of a lease for life was set up in opposition to the payment of a note given for the purchase money, the broad doctrine thus announced by the court has been approved and consistently followed in subsequent cases ; Medler *v.* Hiatt, 8 id. 171 ; Rockhill *v.* Spraggs, 9 id. 30 ; Gibson *v.* Eller, 13 id. 124 ; Wainscott *v.* Silvers, id. 497 ; Lindley *v.* Dakin, id. 388 ; Page *v.* Lashley, 15 id. 152 ; Lamb *v.* Donovan, 19 id. 40 ; McMahan *v.* Stewart, 23 id. 590 ; Pitman *v.* Conner, 27 id. 337 ; Fitzer *v.* Fitzer, 29 id. 468 ; Heavilor *v.* Heavilor, id. 509 ; Robinius *v.* Lister, 30 id. 142 ; Pea *v.* Pea, 35 id. 387 ; Carver *v.* Louthain, 38 id. 530 ; and is now regarded as the settled law of that State. Allen *v.* Lee was cited with approval in Sidden *v.* Riley, 22 Ill. 111, *supra ;* and the same doctrine was applied in the recent case of Laudman *v.* Ingram, 49 Mo. 212.

covenant within whose scope it is included,[1] and that in some cases the vendor may be expected to discharge it out of the purchase money.[2]

For all these reasons, therefore, whenever the contract is that the purchaser is to take the land *cum onere*, the incumbrance should be expressly excepted in the deed from the operation of the covenant, in which case, of course, the covenantor will not be liable.[3] The same result would obviously follow if a sealed

[1] Harlow *v.* Thomas, 15 Pick. (Mass.) 70; Burbank *v.* Pillsbury, 48 N. H. 483; Jacques *v.* Esler, 3 Green's Ch. (N. J.) 463; Long *v.* Moler, 5 Ohio, 274; Keith *v.* Day, 15 Verm. 670; Refeld *v.* Woodfolk, 22 How. (S. C. U. S.) 326. "It is true," said the court in Long *v.* Moler, *supra*, "there are cases which countenance the doctrine that known incumbrances are presumed to be excepted from the operation of the covenant. But a majority of the court are of opinion that the weight of reason and authority alike are clearly the other way [citing the text]. Nothing is more common than for parties to make and accept covenants of this kind with a full knowledge of existing incumbrances, the covenantor relying on his ability to discharge them, and the covenantee in the security which the covenant affords, and the fact of a purchaser having notice of an incumbrance is the very reason for his taking a covenant within whose scope it is included." And in the very recent case of Butcher *v.* Peterson, 26 W. Va. 447, the same view was taken.

[2] Dunn *v.* White, 1 Ala. 645; Skinner *v.* Stamer, 24 Pa. 123; Grice *v.* Scarborough, 2 Spears, (S. C.) 654.

[3] Aufricht *v.* Northrup, 20 Io. 62; Kinnear *v.* Lowell, 34 Me. 300; Freeman *v.* Foster, 55 id. 508; Foster *v.* Woods, 16 Mass. 116; Sanborn *v.* Woodman, 5 Cush. (Mass.) 36; Shears *v.* Dusenbury, 13 Gray, (Mass.) 292; Kirk *v.* Burkholtz, 3 Tenn. Ch. 421; Potter *v.* Taylor, 6 Verm. 676; Van Rensselaer *v.* Kearney, 11 How. (S. C. U. S.) 321, and see the cases cited *infra*. Mr. Preston, in his practical instructions as to the preparation of abstracts of title, after suggesting that in general they need only set forth that there are "the usual covenants for title," adds: "Sometimes the covenants are expressed more fully by showing the extent of the covenant, and consequently introducing the clause 'notwithstanding,' etc. That part of the covenant which deserves the most attention is the *exception*, if any, *against incumbrances;* such exceptions, as often as there are any, and the incumbrances there noticed, as far as they are material to the title, should be stated in the words of the covenant, and at least so fully as to show the nature and extent of those incumbrances." 1 Preston on Abstracts of Title, 153. In Foster *v.* Woods, 16 Mass. 116, where the conveyance was made, excepting from the covenants "all mortgages made by defendant's intestate in his lifetime, and which are duly recorded," evidence was held admissible on the part of the defendant to show that a recorded deed from the intestate, absolute on its face, was in fact accompanied by an unrecorded defeasance so that the two constituted a mortgage, which therefore came within the exception in the covenant.

When, however, an incumbrance has been expressly excepted from the operation of the covenant, it must not be supposed that this exception has, in general, any other or greater effect than to bar a recovery against the grantor. It does not create an express liability on the part of the purchaser to discharge the incumbrance. Johnson *v.* Monell, 13 Io. 300; Aufricht *v.* Northrup, 20 id. 62; Drury *v.* Tremont Improvement Co., 13 Allen, (Mass.) 171; Strohauer *v.* Voltz, 42 Mich. 444; Belmont *v.* Coman, 22 N. Y. 438. Nor of course can the exception from the covenant of an incumbrance which is invalid in itself give it validity as against the grantor. Melley *v.* Casey, 99 Mass. 241. Where, however, a lease is excepted from

instrument to that effect were executed contemporaneously,[1] and duly recorded in the line of search.[2]

§ 89. To avoid all question, it is better for *the purchaser*, also, that the incumbrance should be specially excepted, for it seems sometimes to have been thought, though never so directly decided,[3] that, when the incumbrance is known to exist, the purchaser will be deemed to have taken the estate subject to it. Sugden has said, "It sometimes happens that a purchaser consents to take a defective title, relying for his security upon the vendor's covenant. Mr. Butler remarks that where this is the case the agreement of the parties should be particularly mentioned, as it has been argued that as the defect in question is known, it must be understood to have been the agreement of the purchaser to take the title subject to it, and that the covenants for the title should not extend to warrant it against this particular defect."[4] But

the covenant, the only effect of such exception is to protect the grantor; but where the rent passes to the purchaser with the reversion, the exception obviously cannot be relied on by the grantor as a reservation of the rent to himself. Gale *v.* Edwards, 52 Me. 363.

[1] Brown *v.* Staples, 28 Me. 497; Reid *v.* Sycks, 27 Ohio, 285. In Copeland *v.* Copeland, 30 Me. 446, the agreement, though reduced to writing, seems to have been unsealed. In Watts *v.* Wellman, 2 N. H. 458, the report does not state whether the agreement by which the plaintiff was to discharge the incumbrance was or was not written, but as he demurred to the plea which set up such an agreement in bar, he of course admitted its existence.

[2] The cases last cited were between grantor and grantee, or, as in the case in Maine, where the latter had notice and the question as to the registry acts did not arise.

[3] Except in that class of cases referred to *supra*, § 76, where the alleged incumbrance is deemed not to be such, but merely an incident of the estate conveyed.

[4] Sugd. on Vend. (14th ed.) 573. So in Hughes's Practice of Sales of Real Property, it is said, "It is sufficient to covenant against incumbrances generally, without any particular specification, unless the estate is subject to a known incumbrance; then, it seems, if the purchaser intend to rely upon a vendor's covenants, they should be made expressly to extend to such incumbrance, otherwise it may be presumed that he took the estate subject to such incumbrance, and this should be added at the end of the covenant, as follows: 'and particularly of, from, and against a certain quit-rent,' etc." Vol. ii. (2d ed. 1850), p. 205.

Savage *v.* Whitehead is the case cited by Sugden as the authority for the observation in the text. That case (reported 3 Chan. Rep. 14) is as follows: "Sir Thomas Savage, the plaintiff's father, sold land to the defendant's ancestors, and covenanted that they were free of incumbrances, and gave a collateral security on other lands also; and the purchaser having entered on the security for damnifications, the bill was to have the collateral security reconveyed; whereto the defendants having set forth divers incumbrances on the purchased land and, *inter alia*, a lease of twenty-one years of parcel thereof, the plaintiff replied generally; and at the hearing, a reconveyance was decreed on satisfaction of the damnification; and upon the report the plaintiff excepted against the lease, that it was no incumbrance because they had proved the purchaser had notice of it at the time of the purchase, whereto

the remarks and authorities already submitted will show that no such presumption can properly arise.

§ 90. With respect to incumbrances known to the vendor, there are at least three States in which his obligation to make them known to the purchaser is now enforced by statute, and in two of them the omission or neglect so to do is a penal offence.[1]

the defendants insisted that the notice was not issue in the case; yet Lord Keeper Bridgman would not conclude the infant by a slip of her counsel, in not putting it in issue upon the replication, but ordered a trial whether the purchaser agreed to take the lands, charged with the lease." But Bridgman's reputation as a common law judge was not sustained by his decisions in chancery; 3 Campbell's Lives of the Chancellors, 231; and this case is apparently unsupported by other authority; unless indeed it was with reference to it that Sir W. Grant, in Ogilvie *v.* Foljambe, 3 Mer. 531, said, "Even in cases where there has been a covenant against incumbrances, it has been sometimes doubted whether that covenant would extend to protect a purchaser against incumbrances of which he had express notice."

[1] Thus in Massachusetts, it is provided, Pub. Stat. of Mass., 1882, p. 746, § 17: "In all conveyances of real estate by deed or mortgage upon which any incumbrance exists, the grantor, whether he executes the same in his own right, or as executor, administrator, assignee, trustee, or otherwise by order of law, shall, before the consideration is paid, by exception in the deed or otherwise, make known to the grantee the existence and nature of such prior incumbrance so far as he has knowledge thereof." Id. p. 746, § 18: "Whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances when an incumbrance appears of record to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee, his heirs, executor, administrator, successors or assigns, for all damages sustained in removing the same." Id., p. 1147, § 67: "Whoever conveys real estate, knowing that an incumbrance exists thereon, without, before the consideration is paid, informing the grantee of the existence and nature of such incumbrance, so far as he has knowledge thereof, shall be punished by imprisonment in the jail not exceeding one year, or by fine not exceeding one thousand dollars." As to this 18th section, it is said in Crocker's Notes on Public Statutes of Massachusetts, 229, "Quære, as to the effect of this section to change the rule of the common law, that a covenant against incumbrances does not run with the land, and that an action thereon cannot be brought by an heir or assignee of the covenantee [citing cases as to which see *infra*, Ch. X.]. The Commissioners on the Revision of 1881 dropped this section as being 'unintelligible and superfluous,' but the committee of the legislature restored it, . . . [it being] claimed that the section was intended to apply to incumbrances *appearing on the record, but not existing in fact;* and this view seems to have been adopted by the committee." As to both of these suggestions see, *infra*, the case in Minnesota.

So in Minnesota it is provided (Gen. Stat. of Minn., 1881, p. 539, § 34) that "In all conveyances of real estate by deed or mortgage, upon which any incumbrance exists, the grantor, whether he executes the same in his own right, or as executor, administrator, assignee, trustee, or otherwise, by order of law, shall, before the consideration is paid, by exception in the deed or otherwise, make known to the grantee the existence and nature of such prior incumbrance, so far as he has knowledge thereof." Id. p. 539, § 35: "Whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances, when an incumbrance appears of record to exist thereon, whether known or unknown to him, shall be liable, in an action of contract, to the grantee, his heirs, executor, adminis-

In subsequent chapters will be considered the measure of damages for a breach of this covenant,[1] and the doctrine as to its running with the land.[2]

trator, successors, or assigns, for all damages sustained in removing the same."

In the interpretation of this statute, it was held in Hawthorne *v.* City Bank, 35 Minn. 382, upon the authority of the interpretation of the Massachusetts act, that it had reference solely to incumbrances *appearing* of record to exist *but not existing in fact*, as in the case of a recorded mortgage which had been fully paid but not discharged of record, the object of the statute being to give a right of action against the grantor "for all damages in removing the same" as a cloud upon the title. In this case it was also argued by counsel on one side that the statute was intended to change the rule which limited the measure of damages for breach of the covenant by the consideration money, and on the other (obviously on the strength of the query in Crocker) that its object was to declare that an action on this covenant might be maintained by the assignee of the grantee, neither of which contentions was sustained by the court.

In New Hampshire, it is provided, "If any person shall, in his own right or in any other capacity, make any deed or conveyance of any real estate, knowing that any incumbrance exists thereon, without informing the grantee, by exception in the deed or otherwise, before any part of the consideration is paid, of the existence, nature, and amount thereof, so far as he knows the same, he shall be imprisoned not exceeding one year, or fined not exceeding one thousand dollars." Gen. Laws of New Hampshire, 1878, pp. 620, 621, § 6.

[1] *Infra*, Ch. IX.

[2] *Infra*, Ch. X.

CHAPTER VI.

THE COVENANT FOR QUIET ENJOYMENT.[1]

§ 91. The covenants for seisin and of good right to convey are sometimes spoken of as covenants for "the title," while that for quiet enjoyment has been defined to be "an assurance against disturbance consequent upon a defective title."[2] While in England it is sometimes called "the sweeping covenant," its place has here been largely supplied by the covenant of warranty, which is considered the principal or sweeping covenant in American conveyances. It is, however, on both sides of the Atlantic, the only covenant usually inserted in a lease; and in Pennsylvania at least and perhaps elsewhere, in ground-rent deeds.[3]

§ 92. By reference to a preceding chapter,[4] it will be seen that where it is intended that the covenant for quiet enjoyment should be limited to the acts of the vendor or lessor, it is usual to insert, after the words "that the premises shall be quietly enjoyed without interruption of the grantor or lessor or his heirs or any person or persons whomsoever," these words: "lawfully claiming or to claim by from or under him them or any of

[1] For the form of this covenant, see *supra*, Ch. II. pp. 24, 26, 29. "The covenant for quiet enjoyment," said Mellish, L. J., in Leech *v.* Schweder, L. R. 9 Ch. App. 474, "in its plain and ordinary terms, does not increase or enlarge the rights which were granted in the previous part of the conveyance."

[2] Howell *v.* Richards, 11 East, 641. An illustration of this is found in the cases of Wilder *v.* Ireland, 8 Jones L. (N. C.) 88, and Parker *v.* Richardson, id. 452, in the former of which it was held that where a tenant for life conveyed in fee, covenanting for quiet enjoyment, there was no breach so long as his life estate endured, while in the latter the cesser of the life estate and eviction by the remainderman of course worked a breach of the covenant.

Perhaps a fuller definition was given by Sharswood, J., in Moore *v.* Weber, 71 Pa. 429: "The covenant of quiet enjoyment, whether express or implied, only means that the tenant shall not be evicted or disturbed by good title in the possession of the demised premises or part thereof." This of course referred to the relation of landlord and tenant.

[3] That is to say, deeds which convey the fee, and reserve as the entire consideration a perpetual annual rent, redeemable or extinguishable, however, at any time by the payment of a certain principal sum by the purchaser.

[4] Ch. II. pp. 24, 26, 29.

them or by or with his or their acts means consent default privity or procurement."

These words have been made the subject of several decisions, principally in the English courts, to which it is here proper to refer.

Where a lessor covenanted against any interruption of or by himself, "or any other person or persons lawfully claiming or to claim by from or under him them or any of them," and the premises were distrained upon for arrears of land-tax, due by him before making the lease, it was held that "this distress was certainly not a proceeding within the terms of the covenant. Let, suit, disturbance, or interruption by the defendant or others claiming by, from, or under him, are different things from the injury here complained of, those words implying a claim by title from the lessor. Here the claim was against him." [1]

Where, however,[2] a fine was levied of a wife's estate with a joint power to the husband and wife to declare the uses, which they did by reserving a power of leasing and appointing a remainder, and the husband then made a lease not warranted by the power, covenanting against interruptions by him or any one claiming *by, from, or under him*, and the lessee being afterward evicted by the remainderman by reason of the defective execution of the lease,[3] Lord Mansfield said that as the husband was a necessary party to the declaration by which the remainder was limited, the remainderman "certainly claimed *under* him, within the meaning of this covenant. Undoubtedly the husband had covenanted against his own acts, and the new limitations were created by one of his acts."

[1] Stanley *v.* Hayes, 3 Q. B. 105. In Ireland *v.* Bircham, 2 Scott, 207, the eviction was by the original grantor of a lease for non-payment of rent by the lessee, who had assigned the term to the plaintiff, covenanting for quiet enjoyment. The question whether this was a disturbance "by, from, or under them," although argued by counsel, was not decided, as the case went off upon another ground. See *infra*, Ch. XII.

[2] Hurd *v.* Fletcher, 1 Dougl. 43.

[3] On behalf of the defendant, it was contended that the declaration of appointment and the fine were to be considered as one instrument; that the husband only joined in the fine for conformity; and the fine being the act of the wife (since persons taking under a power claim under the one who creates, and not under the one who executes it), the remainderman took his estate from the wife and not from the husband; and therefore, that the covenant, which was limited to the acts of the husband and those claiming under him, did not extend to the case.

So where one upon his marriage settled an estate upon himself for life with remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years determinable on three lives, and afterward granted a lease of part of the estate for the lives of three persons, and covenanted that the lessee should quietly enjoy during the said term without the interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors, and the lease not being in conformity to the power, the eldest son of the lessor, on the death of the latter, brought ejectment and evicted the lessee, whose *heir* brought covenant against the son as his father's heir, on behalf of the defendant it was urged that he could not be said to claim *under* his father, but in his own right as tenant in tail under the marriage settlement; but the court was clearly of opinion[1] that the defendant was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment.[2]

So in a later case,[3] lands were on a man's marriage settled, in execution of a power reserved to his father, in trust to convey to his father for life, remainder to himself for life, remainder to his first and other sons in tail, with power of leasing for twenty-one years. The settlor subsequently demised part of the premises for three lives, and covenanted for quiet enjoyment during that time, "without any let, suit, denial, interruption, or disturbance of or by him, his heirs or assigns, or any other person or persons claiming by, from, or under him or them." On the death of the lessor, his eldest son brought ejectment against and evicted the tenant, who thereupon claimed damages from the lessor's estate; but the master to whom the matter was referred found that the estate was not subject to any liability by reason of the covenants. On exception to his report it was urged on behalf of the estate that the eldest son did not claim *under* the lessor, but under the creator of the power, viz. his father.[4] But

[1] Upon the authority of Hurd *v.* Fletcher, *supra*.

[2] Evans *v.* Vaughan, 4 Barn. & Cress. 261; s. c. 6 Dowl. & Ryl. 349. It was also held that by the words "during the said term" was understood the term which the lessor purported to grant by his deed, and not, as contended by the defendant, a term continuing only for the life of the lessor.

[3] Calvert *v.* Sebright, 15 Beav. 156.

[4] There was also another ground of defence. The lessor had covenanted "so far as in his power lay, or he lawfully might or could," and it was urged that the covenant was then qualified by this

Romilly, M. R., asked, Was it not the intention that the estate should be continued to the lessee during the whole term for which it was granted, and did not the covenant affirm that the grantor neither had done nor would do anything to prejudice the title of the lessee to that term? If he held that the covenant only affected such estate as the lessor had, or was confined to the persons claiming under him any interest he might then have in the land, he would be giving a qualification to an unrestricted covenant. In many cases, such a covenant was a great security for the title, and he was of opinion that those words ought to be construed in their largest possible terms; and that when a person having a power to appoint executes that power, the appointee does in fact obtain the estate "by, from, or under" the appointor, and consequently that any eviction by the appointee comes within the terms of a covenant for quiet enjoyment as against all persons claiming "by, from, or under" the grantor.

So where the defendant assigned a term of a thousand years to trustees in trust to raise by way of mortgage a sum of money for the payment of his debts, and the trustees accordingly assigned the term on mortgage, and the defendant subsequently granted a lease of part of the lands, covenanting with the lessee for quiet enjoyment during the term, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the lessor or any person claiming by, from, or under him, the lessee was afterward compelled to give up possession to the mortgagee, and the court had no hesitation in deciding that there was a disturbance by one claiming *through and under* the defendant, within the meaning of the covenant for quiet enjoyment.[1]

So a recovery of dower by the wife of the covenantor is within the covenant for quiet enjoyment against all claiming from or under him.[2]

clause. See the case noticed on this point and classified with others, *infra*, Ch. XII.

[1] Carpenter *v.* Parker, 3 C. B. (N. S.) 206. The court seemed to entertain some doubt whether the facts in this case amounted to an eviction (see *infra*, Ch. VIII.), but none whatever that they constituted a molestation and disturbance within the words of the covenant.

[2] Anonymous, Godb. 333; Shep. Touch. 171. "Otherwise," it was said, "if the woman who demanded dower had been the mother of the lessor, the action would not then have lain against the heir because she did not claim by, from, or under the lessor." Tooker *v.* Grotenkemper, 1 Cincinnati, Sup. C. R. (Oh.) 88, was too plain for argument. The owner of land subject to a mortgage created by a prior owner leased it with a covenant for quiet enjoyment without molestation from himself or any one claiming under

So in a very recent case the defendant, the owner of two farms, one on higher ground than the other, rented the former with the right to use an underground drain passing through the other, to one tenant, and then rented the other to the plaintiff, reserving a right to enter and repair the drain, and covenanting for quiet enjoyment against his own acts and the acts of all persons lawfully claiming through or under him. Subsequently, by reason of the defective construction of the drain, the proper use of it by the tenant of the upper farm flooded the plaintiff's field and damaged his crops, and the court held that this was a substantial interruption of the plaintiff's enjoyment of the land by a person lawfully claiming through the defendant and therefore a breach of the covenant.[1]

§ 93. It has also been held that the words "acts and means" import something actually *done* by the person against whose acts the covenant is made. Thus where one holding under a lease which reserved a power of re-entry in case of the exercise of any trade or calling on the demised premises made an under-lease in which he covenanted against interruption by him, or "by or through his acts and means," and the under-lessee let the premises again to one who commenced the business of an auctioneer, and the original landlord re-entered, it was held, in an action by the second lessee against his lessor upon the covenant contained in his lease, that the eviction was not within the words of the covenant. The word "acts" meant something *done* by the person against whose acts the covenant was made, and the word "means" had a similar meaning, something proceeding from the person covenanting. The eviction was not produced by anything proceeding from the covenantor, but from the person in possession of the premises, and judgment was given for the defendant.[2]

him, and it was obviously held that the eviction of the lessee by foreclosure of the mortgage was no breach of the covenant.

[1] Sanderson *v.* Mayor of Berwick, L. R. 13 Q. B. D. 547. The point of this decision is sharply brought out by the fact that the plaintiff also sought to recover in the same suit damages for injuries to his crops resulting from the improper use of a properly constructed drain on the same lands and by the same tenant of the upper farm, but the court held that it was no breach of the covenant.

[2] Spencer *v.* Marriott, 1 Barn. & Cress. 457; s. c. 2 Dowl. & Ryl. 665. The authority of this case has also been recently affirmed in Dennett *v.* Atherton, L. R. 7 Q. B. 316, *infra*, Ch. VIII., where the facts were very similar, and was lately followed in Bellamy *v.* Barnes, 44 U. Can. Q. B. 315. Of course, the colonial decisions follow those of the mother country unless local statutes intervene.

The somewhat recent case in the Queen's Bench of Thackeray *v.* Wood, 5 Best & Sm. 325, affirmed in the Exchequer

So in a case in Massachusetts, where the defendant covenanted "against the lawful claims and demands of all persons claiming by, through, or under him, and against no other claims and demands," it was held that a prior claim for taxes, assessed against the property before it came to the defendant, did not come within the covenant.[1]

§ 94. The word "default" was once held to extend to an arrear of quit-rent which the purchaser was obliged to discharge, *although not accruing while the covenantor was owner of the premises.* It was said that if it happened to be in arrear in his lifetime, it was a consequence of law that it was of his default in respect of the party with whom he covenanted.[2] But this decision seems open to much observation.[3]

Chamber, 6 id. 766, also turned upon what had been an "act done" by the covenantor, which it was held was no breach of the covenant of right to convey (see the case *supra*, p. 83, n. 3), but would, it was thought, have been a breach of a covenant for quiet enjoyment had the deed contained such a covenant.

[1] West *v.* Spaulding, 11 Met. (Mass.) 556; Rundell *v.* Lakey, 40 N. Y. 513; Ingalls *v.* Cooke, 21 Io. 560; and *supra*, § 77.

[2] Howes *v.* Brushfield, 3 East, 491, per Lord Ellenborough.

[3] Sugden has said of it: "It was argued by the counsel for the vendor, and apparently on very solid grounds, that to make the vendor liable to the arrear of his rent, under his covenant, would be tantamount to a decision that the covenant, although limited, should extend to the acts of all the world. The clear intention of the parties was that the vendor should covenant against his own acts only, and yet it should seem that the argument of the court would apply as well to a mortgage or any other incumbrance created by a prior owner, as to an arrear of quit-rent in payment of which a former occupier made default. The reader should be cautious how he applies this decision to cases arising in practice, as it may lead him to draw conclusions not authorized by prior decisions." Sugd. on Vend. (14th ed.) 602. It certainly never was imagined in Pennsylvania, where ground-rents are and quit-rents were formerly common, that a vendor was ever held liable to his purchaser under a limited covenant against incumbrances by reason of arrears of ground-rent accruing for a longer period than he himself possessed the premises; though if the covenant were a general one it would of course be otherwise. Hamond *v.* Hill, 1 Comyn, 180.

The same author remarks that care must be taken to distinguish this case from Cavan *v.* Pulteney, 2 Ves. Jr. 544, where the covenantees were evicted by reason of their covenantor not having suffered a common recovery, which would have given him a fee simple, of which in the deed he recited that he was seised; and the consequent eviction by the remainderman was therefore by the covenantor's "default," since "the act required to make good the title was within the compass of his own estate, and within his own power: therefore the omission to do it was a default by him within the limit of a covenant strictly restrained to his own acts, and he assumed as far as his own acts or defaults extended to be seised in fee. In Howes *v.* Brushfield the seller assumed in like manner to be seised free from incumbrances, but he did not assume to be entitled free from incumbrances by whomsoever created; the two cases would have been similar, had it not been in the seller's own power to have suffered the common recovery in Cavan *v.* Pulteney. If a third party's concurrence

In a subsequent case,[1] one who had received from a tenant for life and his son, remainderman in tail, a lease for ninety-nine years, underlet the premises, with a covenant for quiet enjoyment against himself and his heirs and all persons lawfully claiming under them, "or by or with his or their acts, means, consent, neglect, default, privity, or procurement." The tenant in tail and his son both died, and the next remainderman evicted the underlessee, who thereupon brought covenant. The court said that the eviction, being by a paramount title, could not be brought within the covenant unless by means of the words "neglect or default" of the covenantor, who certainly might have required his lessors, the tenant in tail and his son, to have suffered a common recovery; but that before a breach could be assigned on these words it must be averred that the covenantor had the power or means of procuring such common recovery, and that he neglected or omitted to do so. "With such an allegation made and proved, an action of covenant might possibly be maintainable, but not without it. It may, indeed, show a want of discretion in the covenantor that he took leases under such a defeasible title, but a neglect and a default seem to imply something more than the mere want of discretion with respect to his own interests, something like the breach of a duty or legal obligation existing at the time; these words, in their proper sense implying the not doing some act which he ought to have done, and which he had the power to do, and the not preventing or avoiding some danger to the title, which he might have prevented or avoided."[2] So where

had been necessary, which the seller must have purchased, and that had been deemed obligatory upon him within his covenant, then the case would have been the same as Howes *v.* Brushfield." Sugd. on Vend. (14th ed.) 603.

[1] Woodhouse *v.* Jenkins, 9 Bing. 431; s. c. 2 Moore & Scott, 599.

[2] The case of Blatchford *v.* Mayor of Plymouth, 3 Bing. N. C. 691, seems principally to have been decided upon the insufficiency of the breach assigned, though from expressions used by the court it may be doubted whether they thought the covenant was broken at all. The defendants demised a mill stream, except so much water as should be sufficient for the supply of persons whom the lessors should already have contracted with, or should thereafter contract to supply, provided that such a quantity should be left as would be sufficient to supply the mill for twelve hours a day, with a covenant that the lessee should enjoy without interruption of the lessors, or any persons claiming by their acts, means, consent, default, privity, or procurement. The breach assigned was that the defendants, at divers times between the execution of the lease and the bringing of suit, caused and procured to be drawn off large quantities of water, etc. On the trial it appeared that nothing had been done since the making of the lease, but that there were outlets to the stream, granted to the parties many years before by acts of Parliament. It was held that

the owner of a house, rented in apartments to separate tenants, each floor being supplied with water through a branch of the main pipe descending from a tank on the roof, was sued on a covenant for quiet enjoyment by a tenant whose apartment had been flooded and goods damaged by the bursting of a branch pipe, and the jury found there had been no negligence on the part of the defendant in constructing and maintaining the pipe, the court held that the covenant was prospective in its operation and there had been no breach of it.[1] In a very recent case in England the plaintiff — who had taken an assignment of a lease for a term expiring March, 1887, containing a covenant for quiet enjoyment "against any let, suit, trouble, *denial*, interruption, or molestation by or from him the said T. H., or from or by the said superior landlord or any person claiming," etc. — was notified by the superior landlord to quit the premises in March, 1886, when the head lease would expire. Under agreement, a new lease from the superior landlord was made to the plaintiff, commencing from March, 1886, and the latter in 1885 sued her lessor on the covenant, claiming as damages a year's interest on the sums which she had to pay under the agreement for repairs, and as premium for the new lease.[2] Stephen, J., was of opinion that although the plaintiff had

upon this evidence the breach was badly assigned. The evidence might have suited a breach that persons having rights under prior grants had diminished the quantity of water. If the plaintiff meant that he was injured by contracts entered into by the defendants previously to the demise, the breach should have been framed accordingly; and Tindal, C. J., remarked, that the evidence did not fall within the triple condition of the covenant, the terms of which were made to guard against acts of the defendants individually, acts of persons claiming under them, and acts occasioned by their means and default. See Dexter *v.* Manley, 4 Cush. (Mass.) 14, cited *infra*, Ch. IX.; Swasey *v.* Brooks, 30 Verm. 692.

[1] Anderson *v.* Oppenheimer, L. R. 5 Q. B. D. 602. "The covenant is prospective in its operation," said the court. "The defendant covenants that from the time of granting the lease the plaintiffs' enjoyment of the premises demised to them shall not be obstructed by any act of either the defendant or of any one for whom he is responsible. But the only act done by the defendant was done before the lease was granted to the plaintiffs. The jury have found in the defendant's favor that the act was not done negligently. After the lease had been granted, there was no breach of any duty, there was no act of either commission or omission, and no negligence. What happened was the result of the forces of nature. The covenant being prospective, no breach of it was committed."

[2] Jones *v.* Hawkins, 3 Times Law R. (Nov. 19, 1886) 59. For the defendant it was contended that the facts only went to a breach of the covenant *for title*, while there was none; that the fact that the defendant proved to have no title for the last twelve months of the term was no breach of the covenant for quiet enjoyment, as the plaintiff had been in no way disturbed in her enjoyment, the writ having been issued in 1885 while she was in undisturbed possession. At most, the

not been turned out, she had been disturbed in her quiet enjoyment, being told that if she did not do certain things and obtain a renewal she must go, and therefore gave judgment in her favor, but only for one shilling damages and without costs.

§ 95. As to the words "means, title, or procurement," in an old case, a fine having been levied of certain lands to the husband and wife and his heirs, the husband made a lease covenanting against interruption or disturbance "by him or his assigns or by any other person or persons by his means, title, or procurement." After the death of the husband, the wife ousted the lessee who brought covenant against her as his executrix. On demurrer, it was objected that the title which the wife claimed was not by any title or means derived from the lessor, but from the conusor of the fine. But the court said, "The question is, if these words of the covenant 'by any person or persons by his means, title, or procurement' are to be referred to the act, viz. the *disturbance*, or to the *title* under color of which the disturbance is made. For if it is to be referred to the disturbance and not to the title, the entry of the wife cannot be a breach of the covenant, for the *disturbance* is not by means of the husband, for he is dead, nor by his title, for the wife is in by survivorship, nor by his procurement; but I hold that the words do not refer to the *act* of disturbance only, but to the title under color of which the disturbance was made, and they are to be construed as if it had been said that no disturbance should be made by any person by force of any *title* acquired by his means, and so it is a breach of the covenant.[1]

damages would be only nominal. The amount paid for repairs would have had to be paid anyhow in 1887, and presumably would then have been larger, and the defendant could not be made responsible for any sum which the plaintiff chose to pay the superior landlord for renewal. For the plaintiff it was contended that there was a breach when that landlord gave her notice, and she relied particularly upon the word "denial" in the covenant, and contended that the measure of damages was the interest on the money which she had to pay a year earlier than she otherwise would have done; citing Lock *v.* Furze, L. R. 1 C. P. 441; *infra*, Ch. IX. The court thought that as to the damages the defendant had nothing to do with any arrangement between the plaintiff and the superior landlord. What the plaintiff had lost was the right of holding from March, 1886, to March, 1887, at the rent of £180. But she would have had to pay for repairs in any case, and had gained whatever might be the estimate of the extent to which the house would get out of repair in a year. The report says that the judge here went into an elaborate calculation of the damages. He could not see what her damage really was, and therefore thought she must have a verdict for one shilling damages, and without costs.

[1] Butler *v.* Swinerton, 2 Rolle, 286; Palmer, 339; Cro. Jac. 657. The report in Cro. Jac. is less clear and full than in

§ 96. Apart from the construction thus given to these words, which are usually found in the covenant for quiet enjoyment and are not so found in the covenant of warranty, nothing is more generally or truly said than that "an eviction is necessary to a breach of the covenants for quiet enjoyment or of warranty." In the former editions of this treatise, the question of eviction was considered in the present chapter. But as the covenant of warranty is, in most of our States, the principal and often the only covenant for title in use, the question of eviction will be treated in connection with the latter covenant.

§ 97. So too the questions as to the pleadings and the burden of proof will be there considered.

In subsequent chapters will be considered the measure of damages for a breach of this covenant,[1] its capacity for running with the land,[2] its operation by way of estoppel or rebutter,[3] and the jurisdiction in equity for its specific performance.[4]

either Rolle or Palmer, and of these the report in the former is the better. Sugden has said of this case: "It may be proper to mention that the case of Butler *v.* Swinerton, which (to borrow an expression of Lord Kenyon's) is the *magna charta* of the liberal construction of covenants for title, is also stated in Shep. Touch. 171, which goes on to state, 'and so it is also if A. purchase land of B. to have and to hold to A. for life, the remainder to C. the son of A. in tail, and after, A. doth make a lease of this land to D. for years, and doth covenant for the quiet enjoying, as in the last case, and then he dieth, and then C. doth oust the lessee; in this case this was held no breach of the covenant,' and for this position Swan's case, Mich. 7 & 8 Eliz., is cited, and no reference is made to any other report of the case. Now this case is in direct opposition to the case of Butler *v.* Swinerton; but from other reports of Swan's case, Mo. 74, pl. 204, Dy. 257, pl. 13, Bendl. 138, pl. 208, and And. 12, pl. 25, it appears that there was no *actual* covenant in the lease, but merely a covenant in law on the words *concessit et demisit*, and therefore the judges thought the action did not lie because the covenant determined with the estate of the lessee." Sugd. on Vend. (10th ed.) 517. As to the covenants implied from the words *concessit et demisit*, see *infra*, Ch. XII.

[1] *Infra*, Ch. IX.

[2] *Infra*, Ch. X.

[3] *Infra*, Ch. XI.

[4] *Infra*, Ch. XV.

CHAPTER VII.

THE COVENANT FOR FURTHER ASSURANCE.[1]

§ 98. It has been said by a learned writer, "This covenant is deemed of great importance, since it relates both to the title of the vendor, and to the instrument of conveyance to the vendee, and operates as well to secure the performance of all acts necessary for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter." [2] Thus in a rather recent case in the Ninth Federal Circuit, a covenant against the claims of all persons claiming by, through, or under the grantor was obviously held to operate upon the estate in the premises which the grantor then had, but the further covenant that if he should obtain title from the United States he would convey the same with warranty, was held to be a covenant for further assurance under which the after-acquired title could be compelled to be conveyed,[3] and in a very recent case in Maryland the distinction between this covenant and the others, as well as its importance, was pointed out.[4] It is, however, perhaps less extensively used in the United States than any of the other covenants for title, which would seem to be owing rather to custom and the inartificial character of early conveyances than to any want of usefulness in the covenant itself or difficulty as to its application.

For the importance of the covenant to the purchaser can hardly be overrated. The remedy, indeed, by an action at law for damages is one seldom sought and the reported cases are few. But whatever may be the doubt of a purchaser's right to the specific enforcement by a court of equity of the other covenants for title, there is little or none with respect to that for further assurance.[5]

[1] For the forms of this covenant, see Ch. II. pp. 24, 29.

[2] Platt on Covenants. The latter part of this sentence must not receive too broad an application; see *infra*, § 104.

[3] Lamb *v.* Burbank, 1 Sawyer, (C. C. U. S.) 227.

[4] Cochran *v.* Pascault, 54 Md. 1.

[5] See *infra*, Ch. XV.

§ 99. A reference to the form of the covenant shows that practically it is an undertaking on the part of the vendor to do such further acts for the purpose of perfecting the purchaser's title as the latter may reasonably require, and the usual mode in England of thus requiring it, is for the purchaser to submit to his grantor a draft of the intended assurance with the opinion of counsel as to its necessity and propriety,[1] and the breach of the covenant does not occur until such a request is made and refused.[2]

[1] Some old authorities held that if the covenant be to make such assurance as the purchaser's counsel should devise, the assurance must not be devised by the purchaser himself, though he be learned in the law (Rosewel's case, 5 Rep. 19 *b*; Bennett's case, Cro. Eliz. 9; Baker *v.* Bulstrode, 2 Lev. 95); but by the form of the covenant as usually expressed in modern times the assurance may be devised by either the purchaser or his counsel. The resolution in Manser's case, according to Coke's report (2 Rep. 3 *a*), that "if the vendor is literate he is bound by law to seal and deliver the assurance presently upon request," and without time to consult with his counsel, seems by the report in Moore, 182, pl. 326, to be rather broadly laid down, and in Bennett's case, Cro. Eliz. 9, it is said that "B. is not only to show him the assurance that he is to make, but is to permit him to read it, and go to his own counsel to consider it." Wotton *v.* Cooke, 3 Dyer, 337 *b*; Symmes *v.* Smith, W. Jones, 314; s. c. Cro. Car. 299; Andrews *v.* Eddon, 1 And. 122; Heron *v.* Treyne, 2 Raym. 750; Miller *v.* Parsons, 9 Johns. (N. Y.) 336; are examples of the various distinctions taken upon this point. According to modern practice, the vendor is entitled to a reasonable time in which to procure professional assistance. Dart on Vend. (5th ed.) 788; Sugd. on Vend. (14th ed.) 614. In England, it seems usual to tender the vendor's costs along with the assurance. Dart on Vend. (5th ed.) 788.

[2] Thus in Fields *v.* Squires, Deady, (C. C. U. S.) 388, the court said: "It is claimed that there is no breach of the covenant for further assurance, because it does not appear that the complainant has devised or demanded any particular assurance or conveyance. Where the covenant is general and does not specify the particular conveyance to be made, but only such as may prove necessary or be advised by counsel, the party claiming under it should demand such a conveyance as he conceives himself entitled to or counsel shall devise, before he can allege a breach and maintain an action for damages. In such case, until the party bound to make further assurance is advised as to what is demanded or needed, he cannot be said to be in default for not performing it. This is the rule in actions at law for damages, which can only be maintained when an affirmative breach of the covenant is shown;" and the distinction was then pointed out between the remedy at law and in equity. "But I apprehend it will be found that the rule has little application to a suit in equity for the specific performance of a covenant. Such suit is not maintained upon a technical breach of the contract, but upon its continuing obligation, binding the party to perform it specifically. In the absence of any special provision in the covenant to the contrary, the suit itself is a sufficient demand for performance. This covenant is special, and requires the performance of a particular thing — the conveyance of the property, if obtained from the United States. A neglect to perform such a covenant, for the purposes of this suit, is equivalent to a refusal to do so. In this respect the covenant does not differ from an ordinary agreement to convey real property;" citing the text.

§ 100. What, then, are "such further acts" as may be reasonably required of a vendor?

First, the act must be necessary. If unnecessary, that is, an act which if done would be useless, it is not such an act as comes within the scope of the covenant. Thus where in a case in the Exchequer, the breach assigned was that the defendants had not directed trustees to do a certain act, the court held that the direction, not being either necessary to be made on the part of the defendant or obligatory on the trustees if made, was not an act within the meaning of the covenant.[1]

§ 101. Secondly, the act must be practicable. Thus where in debt on a bond for the performance of a covenant to make such reasonable assurances as the purchaser should devise, and the plaintiff required that a married woman should levy a fine, the defendant pleaded that the justices of the assize refused to take the cognizance of the fine because she was not *compos mentis*, and the court held that the condition was not broken.[2]

§ 102. Thirdly, the act must be lawful. Thus in a very recent case in the Chancery Appeals, Lord Cairns put the hypothetical case that a covenant for further assurance had provided that the grantor should convey any interest he might acquire in the land whether by fair or by fraudulent means, and asked if that was a covenant which a purchaser could have enforced, and he clearly thought it was not. "In my opinion, a covenant so framed would have been invalid as regards one alternative."[3]

§ 103. And the request for further assurance must not only be reasonable in itself, but be made within reasonable time. Thus

[1] Warn *v.* Bickford, 7 Price, 550; 9 id. 43. So, where in a case in Maryland a bill was filed to compel a vendor to execute, by virtue of his covenant for further assurance, another deed, to be prepared under the direction of the court, merely alleging that the deed already executed did not convey a clear title to the land in question with all its advantages as they might be enjoyed under the original patent, the bill was dismissed with costs, as neither in it nor at the hearing had the complainant shown any specific defect or ambiguity in the deed he had already accepted. Gwynn *v.* Thomas, 2 Gill & Johns. (Md.) 420.

[2] Pet and Cally's case, 1 Leon. 304. So in an anonymous case, Moore, 124, "*Le verity fuit que al temps del request la feme fuit egrotant sic ut laborare non potuit. Et tout le court sembleront que malady excusera cest obligation, car ne fuit reasonable request en temps quant la feme ne fuit able de traveller, et issint si la feme soit grossement enseint sic ut ne poit traveller.*" But of course this being but temporary, the request might have been renewed after recovery.

[3] Heath *v.* Crealock, L. R. 10 Ch. App. 31. See this case *infra*, Ch. XI.

in an old case where husband and wife seised in right of the latter covenanted that they had good right to convey the lands and to make further assurance within seven years, and the wife died within that time and her right descended to an infant so as to render performance impossible, the court held that it was the plaintiff's own fault, that the assurance should have been demanded in the lifetime of the wife, and that her decease which prevented the performance of the covenant was the act of God.[1]

§ 104. Apart from this, it has been said in England that a purchaser may, as of course, require a fine to be levied or a judgment or other incumbrance to be removed.[2]

As to the fine, however, although the older cases seemed to consider it a matter of course that a husband should be thrown into prison for contempt because his wife was unwilling to part with either her own real estate or her dower in his,[3] yet this inhumanity began to be doubted nearly two centuries ago,[4] and in the absence of local statutory enactment would probably not be enforced at this day on either side of the Atlantic.[5] As to the "judgment or other incumbrance to be removed," it is conceived that this proposition must be taken with some qualification. Of course so long as the contract is executory, the rule is general that the vendor must remove all incumbrances, no matter by whom created. But when it is executed by deed, and the question is what may be required under the covenant for further

[1] Nash *v.* Ashton, T. Jones, 195 ; Skinner, 42. "But Pollexfen, of the same side with Williams, showed another breach, viz. that the wife was under age at the time of the covenant, as appears by the verdict ; she then had no power to convey the estate according to the covenant. And this was held a manifest breach, and therefore judgment given for the plaintiff, *nisi*."

[2] Sugd. on Vend. (14th ed.) 613 ; Platt on Covenants, 344, citing Heath, J., in King *v.* Jones, 5 Taunt. 427.

[3] Boulney *v.* Curteys, Cro. Jac. 251 ; Middlemore *v.* Goodale, Cro. Car. 503. "There have been a hundred precedents," said Jekyll, M. R., rather loosely as to numbers, "where if the husband for a valuable consideration covenants that the wife shall join with him in a fine, this court has decreed the husband to do it, for that he has undertaken it, and must lie by it [i. e. in jail] if he does not perform it ;" Hall *v.* Hardy, 3 P. Wms. 189 ; and for this, the somewhat flimsy reason was suggested that he was supposed to have first gained his wife's consent. Winter *v.* D'Evreaux, cited in Hall *v.* Hardy, *supra*.

[4] By Lord Cowper, Outram *v.* Round, 4 Vin. Ab. Baron and Feme, H. b, pl. 4. Conservative as was Lord Eldon, his appreciation of the policy of the law overcame his respect for precedent, and in Emery *v.* Wase, 8 Ves. 505, his views were forcibly put. In the argument, Mr. Romilly cast well-founded doubt as to Sir J. Jekyll's "hundred precedents," which he said could not have been unknown to Chief Baron Gilbert, who questioned the doctrine in his *Lex Prætoria*, 245.

[5] 2 Story's Eq. Jur. § 731 *et seq.*

assurance, the proposition thus broadly stated must virtually depend either first, on the scope of the other covenants in the deed, or secondly, on the nature of the estate conveyed. For it has been seen that all the other covenants for title are either general, that is, extending to *all* paramount titles and incumbrances, or limited, extending only to defects of title or incumbrances created by the vendor. But the covenant for further assurance has in general the same form of expression, whether the other covenants which accompany it are general or limited. It is an undertaking that the vendor will execute such further assurances as may be deemed necessary by the purchaser. If the other covenants in the deed are general — if their breach will be caused by reason of an incumbrance not created by the vendor — then it is conceived that the proposition is correct, and that the purchaser may, instead of suing at law upon his other covenants, invoke the aid of equity to remove the incumbrance. But if the other covenants are limited, and the purchaser would therefore be without remedy at law upon them by reason of the incumbrance not having been created by the vendor, it is obvious that the vendor cannot be compelled to remove an incumbrance which he had not covenanted against.[1]

So too the purchaser's right may depend on the nature of the estate conveyed. There is a class of cases which decide that although the covenants for title may be general, yet when the conveyance is but of a limited estate or interest, the covenants will themselves be restrained and limited to the estate conveyed.[2] Under such circumstances, it would be inequitable that the purchaser should, by virtue of a covenant for further assurance, require the conveyance to himself of any greater estate.[3]

[1] In Colby *v.* Osgood, 29 Barb. (N. Y.) 339, the proposition was properly limited to the case of an incumbrance created by the grantor, which therefore, of course, came within his covenants.

[2] See *infra*, Ch. XII.

[3] And this will be found to be the true meaning of the authorities. In the old case of Taylor *v.* Dabar, 1 Chanc. Cas. 274 (reported also in the same words in 2 id. 212), "A purchaser of the crown lands in the time of the late wars sells part to the plaintiff, and covenants to make further assurance. He, on the king's restitution, for £300 had a lease for years made to him under the king's title. The decree was he should assign his term in the part he sold." Here the original contract obviously appears to have been that any confirmation which might thereafter be made of this then doubtful title should inure to the benefit of the purchaser. So in Smith *v.* Baker, 1 Younge & Coll. Ch. 222, where one believing that he had the fee simple

§ 105. It is obvious, therefore, that no more is meant than that where the covenants for title are not limited or restrained either by the acts of the vendor or by the particular estate conveyed, the purchaser has a right, under the covenant for further assurance, to require the conveyance of a paramount title or the removal of an incumbrance; but where the other covenants are limited to the acts of the vendor or restrained by any particular estate, the purchaser will have no right under this covenant to require the con-

subject to his mother's life estate, conveyed it to trustees for the benefit of creditors, covenanting for title and for further assurance, and it turned out that the mother had the fee simple, which on her death descended to him, it was clearly held that he must be compelled to convey the after-acquired estate. "It may be," said Vice-Chancellor Bruce, "that he did not know what his interest was at the time, but upon the mere circumstances which appear here he cannot be allowed to deprive his creditors of an estate which he disposed of to them for valuable consideration. It is not sufficient for him to say that he had no interest then; that he acquired subsequently the estate which he said he had, and which he may or may not have supposed himself to have had at the time of the execution of the deed. . . . I see enough to satisfy me that there was a contract for value, by deed, *for the sale of this specific estate* to the creditors, and I cannot relieve the party from the effect of that contract."

Sugden has said, in language which unless carefully considered might mislead: "If the title prove bad *and the defect can be supplied by the vendor*, the purchaser may file a bill in equity for a specific performance of the covenant for further assurance. And a vendor who has sold a bad title will, under such a covenant for further assurance, be compelled to convey any title which he may have acquired since the conveyance, although he actually purchased such title for a valuable consideration." 2 Sugd. on Vend. (14th ed.) 612. This proposition is undoubtedly correct if the covenant for further assurance is the only one in the deed, or if the other covenants are unlimited or general. But if the covenant for further assurance is either expressly or by implication limited or restrained by other covenants or by the grant itself (Davis *v.* Tollemache, 2 Jurist, N. S. 1181), then the remark would seem to have too broad an application. In support of it the author cites Taylor *v.* Dabar, which as we have seen was clearly a case in which the conveyance of the after-acquired title was properly compellable, and refers to Seabourn *v.* Powell, 2 Vernon, 11, in which there was no covenant for further assurance at all. The case was, that Austin and his wife, being assignees of a term of years, mortgaged it. Austin became insolvent and absconded, and Haynes, who had the real title, in compassion for Austin's wife, made a lease in trust for her, whereupon the plaintiffs, who were sureties on the bond which accompanied the mortgage, filed a bill, alleging "that the mortgagee had a plain equity to have the benefit of that title which was but a graft into that stock from which he derived; and that the defendant had, since the taking of the estate (and so it appeared on proof), paid the interest to the mortgagee, and that therefore the plaintiffs, being but sureties in the bond, had an equity to have the benefit of the mortgage, and of that new-acquired title, to save them harmless against the bond, or else the trustees ought to be decreed to make a new mortgage to the mortgagees;" and the Master of the Rolls, deeming the estate made by Haynes to be a graft into the old stock, decreed the trustees to make a new mortgage to the mortgagee.

For a full consideration of the right of a purchaser to the conveyance of an after-acquired estate, see *infra*, Ch. XI.

veyance of any other estate,[1] or the removal of an incumbrance not created by the vendor.[2]

§ 106. But subject to these qualifications a grantor will be held to the honest performance of his covenant and not be suffered to escape therefrom by technicalities. Thus in a very recent case in England, the plaintiff claimed specific performance of a covenant for further assurance contained in a deed made in 1875 from the defendant to himself, the defendant having formerly been tenant in tail and having in 1871 executed a deed which would have turned the entail into a fee, but inasmuch as the father did not consent, only a base fee was created. In 1874 the plaintiff ineffectually attempted to purchase the fee simple. The father having died and the defendant being thus in a position to execute a deed which would turn the base fee into a fee simple, the plaintiff brought this suit upon the covenant (which was to "execute every such disentailing and other assurance and do every such thing for the further or more perfectly assuring all or any of the premises," etc.), and although it was urged for the defendant that the father being now dead no disentailing assurance could strictly be executed, yet the court had no doubt that the plaintiff was entitled to a decree.[3]

[1] Thus in Davis *v.* Tollemache, 2 Jurist, N. S. 1181, (and not elsewhere reported,) a tenant in tail having mortgaged all the property to which he was entitled "in possession, reversion, remainder, or expectancy, or otherwise howsoever," with a covenant for further assurance, the mortgagee filed a bill to compel him to execute a disentailing deed, but it was held that such an act was not within the operation of the covenant. "The utmost extent to which the court has gone with reference to covenants for further assurance," said Vice-Chancellor Stuart, "has been to extend their operation to that very estate and interest which are conveyed by the deed." See this case particularly noticed *infra*, Ch. XI. and XV.

[2] This question was in part presented in Missouri, in Armstrong *v.* Darby, 26 Mo. 517, where the plaintiff sold certain lands by a deed containing the words "grant, bargain, and sell," which in that State imply, by force of a local statute, covenants for seisin, against incumbrances done or suffered by the grantor, and for further assurance (see *infra*, Ch. XII.). In a suit on the last of these covenants, the breach assigned was that a mortgage upon the premises, which had been created *by the defendant's grantor*, had been foreclosed, that the defendant was thereupon requested to pay off and discharge the incumbrance, which he refused to do, and that the plaintiff had been obliged to pay it off in order to protect his title and possession. To this the defendant demurred, and the demurrer was sustained, on the ground that the covenant must be taken to embrace such incumbrances only as were created by the grantor.

[3] Bankes *v.* Small, 3 Times Law R. (Jan. 19, 1887), 277. Kekewich, J., held that although there was no recital in the deed of a contract to sell the fee simple, yet notwithstanding Davis *v.* Tollemache, *supra*, it could not be said to be going too far to hold that a contract for the sale of the fee simple had been entered into. The defendant had expressly cove-

§ 107. It seems that in England, where a purchaser, having taken his conveyance without the transfer of the custody of the title-deeds, afterward parts with his own deed to a subsequent purchaser of part of the property, he may, under the covenant for further assurance, require his original vendor who retains the title-deeds to execute a duplicate of the conveyance to himself for his security, as he might otherwise be without any deed whatever;[1] but whether a purchaser who has neglected to take with his conveyance a covenant from his vendor to produce the title-deeds can afterward compel the latter to enter into such a covenant, by virtue of the common covenant for further assurance, seems at least doubtful. He could compel the production of the title-deeds themselves, but not, it would seem, of any papers not strictly within that category.[2]

Of course on this side of the Atlantic the registry acts leave no scope for such questions.

nanted to execute a disentailing deed, which could only be done effectually by turning the base fee into a fee simple. In Davis *v.* Tollemache, though there was a covenant for further assurance, there was none to execute a disentailing deed. If there had been, the Vice-Chancellor's decision would apparently have been different.

[1] Napper *v.* Allington, 1 Eq. Cas. Abr. 166, pl. 4; Dart on Vend. (5th ed.) 788.

[2] Where in Fain *v.* Ayers, 2 Sim. & Stuart, 533, a bill stated that the plaintiff had resold the property which he had purchased with a covenant for further assurance, and prayed in the alternative a new covenant to produce title-deeds, or the actual production of the deeds themselves, a demurrer to the bill for want of equity was overruled. Vice-Chancellor Leach said, "I do not think that there has been a judicial decision upon the particular point whether, under a covenant for further assurance in a conveyance, a new deed of covenant to produce title-deeds may be required. But whatever doubt there may be upon that point, this bill, stating that the plaintiff has resold the property, prays alternatively either a new deed of covenant to produce, or the actual production of the title-deeds, to enable the plaintiff to show a marketable title upon his resale. The defendant's title-deeds being the root of the plaintiff's title, and in that sense a sort of common property (see Barclay *v.* Raine, 1 Sim. & Stu. 449), I strongly incline to think that the plaintiff has an equity to that extent; and I am informed that the Lord Chancellor has expressed an opinion to that effect." But in Hallett *v.* Middleton, 1 Russ. 249, a case which occurred about the same time, where one had conveyed to trustees to sell, if the debts of a partnership in which he had been engaged should exceed a certain sum, and the trustees, reciting that the debts did exceed that amount, conveyed to a purchaser by a deed in which the heir of this partner joined with a covenant for further assurance, and the purchaser filed a bill praying either for the production of the accounts to show that the debts did exceed that amount, or for a covenant for their production, the bill was dismissed by Gifford, M. R., who said, "The covenant creates no obligations in respect of which the documents should either be delivered to him or deposited in a place of security, inasmuch as they are not part of his title;" and added, "It is one of the most extraordinary attempts at relief that a court of equity has witnessed." The precise point stated in the text was not, it will be observed, settled in either of these cases.

§ 108. A distinction is to be observed between mere agreements to convey by reasonable assurance, which are held to carry with them a right to covenants for title in the deed of conveyance,[1] and a right to the insertion of those covenants in the deed of further assurance itself. "Where the agreement," says Sugden, "is to convey an estate upon a sale, the purchaser would have a right to a conveyance with usual covenants, although nothing was expressed about covenants in the agreement. But where the conveyance is really a further assurance, the purchaser must be supposed to have already obtained all such covenants for title as he was entitled to, and therefore could not require any new ones from the seller in the further assurance."[2] And however this may be, it is clear that the vendor is not, in the absence of an express agreement to the contrary, bound to covenant further than against his own acts; but it would seem that out of abundant caution a stipulation to this effect is sometimes inserted by way of qualification to the covenant.[3]

§ 109. It would seem that in suing upon this covenant at law the course of pleading is to assign the breach in the words of the covenant.[4] Some particularity is, however, to be observed as to the form of the declaration. Thus where the defendant covenanted upon request by the testator to make further assurance to him his heirs and assigns, and the breach assigned was that the plaintiff as executrix requested the execution of a release between the defendant and the plaintiff and one S. A. for the further assurance of the premises, on special demurrer the breach was considered badly assigned, as it was not shown what right the plaintiff had, or to whose use the release was to inure, or why S. A. was to be a party to it.[5] So in a case in New York, where upon a covenant that the defendant would, upon the reason-

[1] See *infra*, Ch. XIII.

[2] Sugd. on Vend. (14th ed.) 615. It seems at one time to have been thought that upon an agreement to convey by reasonable assurance the vendor was not bound to insert any covenants, "although they be ordinary and reasonable; yet the agreement not being to make it with reasonable covenants, but only reasonable assurance, he is not bound to seal it, for it is not any part of the assurance, and the assurance may be without any covenants." Coles *v.* Kinder, Cro. Jac. 571; Shep. Touch. 168; Wye and Throgmorton's case, 2 Leon. 130; Pudsey *v.* Newsam, Yelv. 44; Lassels *v.* Catterton, 1 Mod. 67. But such is not the law at the present day.

[3] See *supra*, Ch. II.

[4] Blicke *v.* Dymoke, 2 Bing. 105. A precedent for a declaration on this covenant will be found in 2 Chitty's Pleading, 543; see also 1 Lutw. 284; King *v.* Jones, 5 Taunt. 418.

[5] King *v.* Jones, *supra*.

able request of the plaintiff, do and execute such further and other lawful assurances for the better and more effectually vesting and confirming the premises as by the plaintiff or his counsel should be reasonably devised, advised, or required, the declaration averred that the defendant's wife would on her husband's death have a right of dower in the premises, and that the defendant had been requested by the plaintiff to execute a reasonable conveyance and assurance of the said right of dower according to the true intent and meaning of the covenant, and on demurrer the court held the breach badly assigned, and that the plaintiff, having devised the assurance, was bound to give notice of it to the defendant and allow him a reasonable time to consider it. As no particular assurance was specified in the covenant and none specified by the plaintiff, the defendant could not know what assurance was required.[1]

[1] Miller *v.* Parsons, 9 Johns. (N. Y.) 336. See also Warn *v.* Bickford, 7 Price, 550; s. c. 9 Price, 43; and Gwynn *v.* Thomas, 2 Gill & Johns. (Md.) 420, cited *supra*, p. 131, n. 1. In Blicke *v.* Dymoke, 2 Bing. 105, one purchased a house which was the subject of a tenancy for life with remainder to first and other sons in tail, and the tenant for life covenanted that the first son who should attain the age of twenty-one years should, at the request of the purchaser, well and effectually convey and assure the premises by such common recovery, fine or fines, *and other assurance as counsel should advise.* In an action on this covenant, the declaration averred the seisin and death of the covenantee, and the descent on and seisin of the plaintiff as his heir, the attainment of the majority of the son, the request of the plaintiff that a common recovery should be suffered, and the neglect and refusal of the defendant so to do. On demurrer, it was objected that there should have been an averment that the defendant had notice of the title having devolved upon the plaintiff, and also that it should appear that the suffering of the recovery was advised by counsel, of which the defendant had notice. But the Court of Common Pleas held (upon the authority of Reynolds *v.* Davies, 1 Bos. & Pull. 625; Skip *v.* Hook, Com. 625; Bristow and Bristowe's case, Godb. 161; Hingen *v.* Payn, Cro. Jac. 475; Alfrey *v.* Blackamore, 3 Bulst. 326, etc.), that the first averment was unnecessary; that the plaintiff need only show all that might bring him within the words of the covenant, and that any grounds of exemption must be shown by the covenantor. "I confess," said Best, C. J., "that, unaided by the light of former ages, I should have thought a perfect stranger to the defendant ought to have given him notice that he was become possessed of such an interest in the property as would authorize him to call upon the defendant for the performance of his covenant; but by a series of cases it has been decided that it is not necessary to show any such notice; and in two of the cases the reason assigned is this, that giving notice is no part of the provision; by which I understand that it is only necessary for the plaintiff to show all that brings him within the covenant; any ground of exemption must be shown by the covenant." As to the second objection, it was held that it was admitted by the deed that a common recovery was necessary at all events, and that the words "as counsel should advise" only referred to assurances other than a recovery. "If a covenant be that a party shall execute such assurances as counsel shall advise, the plaintiff must show what has been

In subsequent chapters will be considered the measure of damages for a breach of this covenant,[1] its capacity for running with the land,[2] its operation by way of estoppel or rebutter,[3] and the jurisdiction of equity for its specific performance.[4]

advised ; but that is not the covenant the breach of which is complained of here. In the first instance the defendant only engages to cause a recovery to be suffered, and he did not want to be told by counsel that such a proceeding was necessary, because, in the language of the deed, it is admitted to be necessary. The recovery he was to cause to be suffered at all events, but not to do more unless counsel should advise ; this is the strict meaning of the language of the covenant, and the words *as counsel shall advise* do not overrule the whole of the preceding sentence, but only the stipulation for assurances other than a recovery. Therefore, strictly collecting the meaning of the deed from the language of the deed itself, our judgment must be for the plaintiff."

[1] See *infra*, Ch. IX.

[2] See *infra*, Ch. X.

[3] See *infra*, Ch. XI.

[4] See *infra*, Ch. XV.

CHAPTER VIII.

THE COVENANT OF WARRANTY.[1]

§ 110. In a preceding chapter has been sketched an outline of the doctrine of warranty from its introduction in England before the Conquest down to its natural disappearance after the passage of the statute of Uses.[2] As long as livery of seisin was necessary to the transfer of land, so long did warranty accompany the deed of feoffment. After the statute of Uses had led to the introduction of conveyances which passing the estate by raising a use that the statute transferred into a possession dispensed with livery of seisin, a warranty in its proper sense was inappropriate to such modes of assurance, and a covenant naturally took its place.[3] But it was not a covenant of warranty — that is to say, a warranty in its old form, with words of covenant added thereto — such as is in use throughout the United States at the present day. The covenants which took the place of warranty, and which make their first appearance in the time of Elizabeth and are found in the reports in her reign and in that of James the First,[4] were, in simple and concise form, the type of those which afterward were fashioned by Bridgman in his retirement during the Protectorate, and introduced with all their elaboration on his return to practice after the restoration of Charles.[5] But there is no evidence that the covenant of warranty ever had a place in English conveyancing. From the report of the case of Williamson *v.* Codrington, decided by Lord Hardwicke in 1750,[6] and which arose under a deed executed in 1715 in the colony of Barbadoes,[7] it would seem that such a covenant had never before been seen by either

[1] For the form of this covenant see *supra*, Ch. II. p. 29.

[2] *Supra*, Ch. I.

[3] *Supra*, § 13.

[4] *Supra*, § 13.

[5] *Supra*, § 13.

[6] 1 Vesey, 511.

[7] Hence it would seem that the introduction of the covenant of warranty in America was not confined to those colonies which afterwards formed the United States.

the counsel or the Chancellor, and while they discussed its nature, no authority was cited by way of illustration,[1] and the case seems

[1] The case was this: In the time of Charles I. the Codrington family removed with their property to Barbadoes, and in 1715 William Codrington (afterward baronet) executed there a settlement to trustees of a plantation and negroes in trust for two illegitimate sons, "with a clause that he does oblige himself, his heirs, executors, and administrators, to warrant and forever defend the said plantation and negroes, etc." He was afterward, in 1718, evicted, and having himself brought an ejectment compromised it, and in consideration of a certain sum paid him released all his title thereto. He then returned to England, where he died, and the *cestuis que trust* having filed a bill there for a satisfaction of the covenant out of the assets of his estate, it was urged for the executors and trustees under his will that they were strangers to the transaction, which was originally intended as a provision to take effect from his death: "The deed contains, indeed, a general warranty, but there is no case where a court has considered a covenant by way of general warranty a personal covenant. This is the first instance of a gift of a general warranty in a voluntary deed, so that supposing it looked on as a covenant, yet being so extraordinary, how far should a court of equity give it aid? . . . But this is a general warranty of the land, on which only a real remedy can be had, as if they were in possession, and a real action was brought against them to entitle the tenant to the *præcipe* to vouch the warrantor or his heirs, or to bring *warrantia chartæ*, to affect the lands of the warrantor or his heirs, unless it was a chattel estate recovered, for which there may be personal damages." But Lord Hardwicke held that the complainants were entitled to relief; that they might come into equity, as well as law, to have satisfaction for that debt on that specialty out of assets; and then, referring to the contention that there was no instance in which satisfaction could be demanded against an estate unless for some covenant on which an action or suit might be maintained, the Chancellor went on to say, "Therefore plaintiff resorts to the clause, which he insists on as a covenant from Sir William, entitling him to satisfaction for what was lost by eviction of the estate out of his assets, real and personal; and if it amounts to a covenant, it will intitle thereto. I am of opinion it is not to be taken according to the objection for defendant as a strict warranty of the land; which would be contradictory to the words of the clause. The word 'warrant,' when properly applied, has, to be sure, a particular sense; but has, in general, a further sense; therefore it is not necessary to understand warranty in a deed or covenant barely as a warranty to the title to the realty; but it shall be taken *secundum subjectam materiam*. Here are chattels to be warranted in this deed; some of which are certainly personal things, as cattle, horses, etc., though negroes in some instances are considered as annexed to the plantation. Then there are words binding his executors and administrators, which must be rejected if to be construed as a mere real warranty of the land. This clause, therefore, is inconsistent with that narrow construction; nor is it penned as a real warranty, which is, 'I do for myself and my heirs warrant such land;' here the words are, 'I do oblige,' etc., which amounts to the same as 'I covenant,' etc., for many other words in a deed will amount to a covenant, besides the word covenant, as 'I oblige, agree.' This, then, is barely a covenant for himself, heirs, executors, and administrators, to warrant; which word must be construed in a larger sense than warranty in a strict legal sense — as large as defend. That construction a court of law or equity must put on it. I agree the construction must be the same in both courts, and there is no difficulty, I think, in so construing it in a court of law." And it was decreed that the plaintiff should have satisfaction for the value of the plantation as it stood at the time of sale, and the negroes, etc. from the death of the testator, according to the value at the time of the eviction. See this case further referred to in Ch. XV.

to be almost the only one in the English reports in which this covenant occurs.[1]

§ 111. The principal emigration to America occurred about the time of the introduction into general use of the covenants for title in their present form, and in the earliest conveyances which remain of record in the colonies are to be found some or all of these covenants, more or less simply or elaborately set forth, together with, in general, a clause of warranty, sometimes with and sometimes without the addition of words of covenant.[2] Later, the words of covenant became more general, and at the present day their use is almost universal.

§ 112. Such is the American covenant of warranty. As to its extent and scope different opinions have at times been formed, some giving to it much or all of the effect of a warranty at common law, and others considering it as merely a covenant for quiet enjoyment. As the latter is unquestionably the sounder view, and as the former has led to the introduction of doctrines inconsistent with the present system of conveyancing, a brief notice of the subject may be permitted.

§ 113. It has been considered by eminent authority in America that an action of covenant could have been brought upon a warranty which accompanied the transfer of a freehold.[3] Such, however, was not the law, and no such case can be found in the books.

Warranty in its origin savored so much of the realty that it could be employed only when the estate which was *transferred* was a freehold.[4] Nor when the *paramount* estate was

[1] In Williams *v.* Burrell, 1 C. B. 402, the clause in the lease was a warranty in the old form. In 1 Williams's Conveyancing, 279, published in 1790, there is a form of a deed of bargain and sale which contains a covenant of warranty.

[2] *Supra*, § 14. In a note to Foote *v.* Burnet, 10 Ohio, 322, Mr. Wilcox, the reporter, says: "Our ancestors, who emigrated just about the time the modern covenants for title were coming into use in the mother country and before the warranty had been entirely abandoned, seem to have brought with them both the modern covenants and the warranty, and while the former alone were soon found to be a competent assurance of title in England, both the warranty and the modern covenants continued to be used in our early conveyances and have both come down together to our own time."

[3] Parsons, C. J., in Gore *v.* Brazier, 3 Mass. 523, 545.

[4] "Glanvill's predecessors," says Judge Holmes, "probably regarded warranty as an obligation incident to a conveyance, rather than as a contract. But when it became usual to insert the undertaking to warrant in a deed or charter of feoffment, it lost something of its former isolation as a duty standing by itself and admitted of being generalized. It was a promise by

less than a freehold, was warranty effective as a redress.[1] But as time wore on, and leasehold estates grew into greater importance, the law underwent some change. In the reign of Henry the Sixth we find a case in which a warranty contained in a lease for years was allowed to be used as a personal covenant,[2] and in that of James the First another in which on a warranty contained in a conveyance of a freehold a recovery in an action of covenant was allowed when the adverse claim was under a term for years.[3]

deed, and a promise by deed was a covenant (Pincombe *v.* Rudge). This was a covenant having peculiar consequences attached to it, no doubt. It differed also in the scope of its obligation from some other covenants, as will be shown hereafter. But still it was a covenant, and could sometimes be sued on as such." Common Law, 377.

[1] That is to say, in neither case could a *warrantia chartæ* have been brought.

[2] Year Book 32 Hen. VI. 27, *supra*, p. 15, n. 3.

[3] Pincombe *v.* Rudge, Hob. 3 *g*; Noy, 131; Yelv. 139; in Excheq. Chamb. 32; 1 Rolle, 25; see this case referred to, *supra*, p. 15, n. 4, and *infra*.

Nothing can be clearer than Judge Hare's notice of this case in the note to Spencer's case. "At common law warranty was essentially a covenant real. The right to enforce it, as well as the obligation which it imposed, descended on either side to the heirs of the original parties; the remedy was prosecuted by and against them; and compensation was awarded, not in damages, but in kind, by a judgment for the recovery of other lands of equal value with those which had been lost, whether the eviction took place in the lifetime of the ancestor or after his death. Buicker *v.* Buicker, 11 Ohio, 240, 245. No system could be more comprehensive or more logical; its only fault was a logical subtlety and refinement due to the character of the age which gave it birth. But however well it may have been suited to the purposes which it was designed to subserve, it necessarily proved inefficacious when applied to the modes of tenure and forms of conveyancing of a new and different nature. Thus no recovery could be had in a voucher to warranty or *warrantia chartæ* on a warranty attached to a term of years, which was regarded by the common law as a chose in action rather than an estate, and had no recognized place in the complicated system of real actions; and the difficulty was equally great where the eviction was for a term, although the estate warranted might be a fee. Hence there would have been an entire failure of justice had not the courts consented to interpret the warranty as a covenant personal, when the circumstances were such that it could not take effect as a covenant real. A warranty could not be annexed to the grant of a chattel, real or personal, but if the grantor warranted the title the grantee might bring covenant. Co. Litt. 289. The rule and the exceptions are exemplified by the case of Pincombe *v.* Rudge, Yelv. 139; Hob. 3; which has sometimes been mistaken as an authority for the position that a warranty might always be construed as a personal obligation, whereas what it really shows is, that when a warranty failed as a covenant real, necessity would mould it into a covenant personal. The plaintiffs, who declared on a covenant in a deed granting them an estate for their joint lives by the words *concessi* and *demisi*, and also containing an express warranty, after setting forth the deed in full, without attempting to state its legal operation, went on to aver a breach by an eviction under a lease for years, executed prior to the grant. The defendant pleaded that an action of *warrantia chartæ* for the same cause of action had been brought, and was still pending in another court, and also excepted to the sufficiency of the declaration on the ground that an action of covenant would not lie upon a warranty. But it was held that, as the eviction was merely

These cases have at times been considered as deciding broadly that a personal action of covenant would at any time have lain upon a warranty,[1] and on the other hand it has more than

for a term of years, the *warrantia chartæ* was misconceived, and therefore no bar to another suit; and that even if covenant would not lie on the warranty, it might be sustained on the obligation for the quiet enjoyment of the premises, implied in the word *demisi*. The case was subsequently brought before the Exchequer Chamber, where the decision of the King's Bench was affirmed on the broader and more liberal principle that when a warranty would fail altogether unless a change were made in its attributes, it may be interpreted as a covenant personal, and judgment given for damages instead of for an equal value in land. This case therefore establishes, first, the existence of an essential distinction between a warranty in the proper sense of the term, and a covenant to warrant; and next, that a warranty may be construed as a covenant when there is no other mode of rendering it effectual." 1 Smith's Leading Cases (8th Am. ed.), 215.

Nearly two hundred and fifty years elapsed before a similar case was presented in England, but in Williams *v.* Burrell, 1 C. B. 402 (1845, noticed *infra*, Ch. IX.), nearly the same question arose, and the decision in Pincombe *v.* Rudge was distinctly approved and followed.

[1] Booker *v.* Bell, 3 Bibb, (Ky.) 173; Marston *v.* Hobbs, 2 Mass. 439; Gore *v.* Brazier, 3 id. 523; Townsend *v.* Morris, 6 Cow. (N. Y.) 127; Rickets *v.* Dickens, 1 Murph. (N. C.) 343; Allison *v.* Allison, 1 Yerg. (Tenn.) 24; and in most of these cases an action of covenant upon a warranty in its old form was sustained. Such a course of decision can do no harm, and will "no doubt correspond with the intentions of the parties" (Townsend *v.* Morris, *supra*), but it must be considered as unsupported by the authority of the older common law. This was clearly shown by Judge Story's note to Pincombe *v.* Rudge, in the American edition of Hobart: "Ch. J. Parsons, in Gore *v.* Brazier, 3 Mass. 523, held that a personal action would have lain in England upon a covenant of warranty annexed to a fee, and where the ouster was of the freehold by title paramount. And he cited Waters *v.* Dean of Norwich, 1 Brownl. 21; s. c. 2 id. 158. But there the plaintiff sued on a covenant to save harmless, etc., during the term, which was for life; and the breach assigned was a disturbance by an antecedent lease to one T. for years. So that the case was not different from that in Hobart, 3; the freehold not being brought in question. It is true that Lord Coke, who was chief justice, in giving his opinion, said among other things 'that covenant in law extends to lawful evictions, and to estates in being, and not where an estate is determined. So also, he supposed, to express real covenants, which extend to freehold or inheritance, as warrant and defend, upon which a man cannot have an action if he be not ousted by one which hath title.' This last sentence is that upon which Ch. J. Parsons seems to have relied; but it is manifest that Lord Coke was referring to the difference between a covenant in law and an express covenant, and not to the cases in which covenant would lie on a warranty. According to the case of Pincombe *v.* Rudge (Hob. 3), there is no doubt that covenant would lie if the ouster by title paramount was not of the freehold, but for a term of years only. For is it to be presumed that Lord Coke had any notion in his mind that, if the ouster was in fee, covenant would lie on a warranty? And the covenant in the case before the court was not a warranty, but a covenant to save harmless and acquit; in short, equivalent to a covenant for quiet enjoyment. Besides, the case in Brownlow was decided in 10 Jac. 1; and that of Pincombe *v.* Rudge was finally decided in the Exchequer Chamber by all the judges, in 11 Jac. 1. And therefore, if there be any discrepancy between them, the principle established by all the judges in the last case is the true one. And it seems to me there is a necessary implication in this last case against the doctrine of Ch. J.

once been seriously urged, as it was in Williamson *v.* Codrington, that upon a covenant of warranty in its present form nothing but a writ of *warrantia chartæ* can be brought.[1] In truth, save that the old warranty and the present covenants were alike intended as a means of redress against loss of the estate, nothing could be more unlike than the two. The former was a part of the system of feudal tenure, and the remedy upon it by writ of *warrantia chartæ* or voucher, though peculiar, was appropriate. The latter was a part of what some have called the modern system of law, and the remedy upon it by the personal action of covenant equally appropriate. Warranty originally partook of the simplicity of the common law, and its effect by way of rebutter of the heir was simple and just, till the ingenuity of the times seized upon it for a particular purpose and fashioned it to meet an end — that of barring estates tail — for which it had never, of course, been intended, and hence arose complications which to one imperfectly learned in the history of the subject would seem to present great difficulties.[2] Such an effect was obviously inappropriate

Parsons. At all events, the authority he relies on does not support his *dictum.*" The remainder of the note to Pincombe *v.* Rudge is by Judge Williams, the editor of this edition of Hobart, and with the exception of the note by Mr. Wilcox to Foote *v.* Burnet, 10 Ohio, 322, was, when the earlier editions of this treatise were published, the only instance in which the subject of covenants for title had been, on this side of the Atlantic, treated in a connected form.

[1] Chapman *v.* Holmes, 5 Halst. (N. J.) 23; see the remarks of Tilghman, C. J., in Jourdan *v.* Jourdan, 9 Serg. & Rawle, (Pa.) 276; Stout *v.* Jackson, 2 Rand. (Va.) 148 (see three elaborate opinions in that case); Tabb *v.* Binford, 4 Leigh, (Va.) 132; Rex *v.* Creel, 22 W. Va. 373. In Chapman *v.* Holmes, *supra*, both the counsel and the court seem to have overlooked the distinction between a warranty and a covenant; the counsel, in an elaborate and otherwise able argument, insisting that because voucher and *warrantia chartæ* were the ancient remedies on the former, they must still be so on the latter. In Townsend *v.* Morris, 6 Cow. (N. Y.) 123, there was more room for such an argument, for there was no covenant *in hæc verba*, but the form was as in the old charters, and the court, in deciding the obvious point that the assignee of a vendee could sue upon a covenant of warranty, intimated that the tenant of the freehold *always had* his option to bring covenant, or resort to the real action. A passage in Bac. Ab. Covenant, C, that "in the eviction of a freehold no action of covenant will lie upon a warranty," was misquoted in Pitcher *v.* Livingston, 4 Johns. (N. Y.) 11, and cited as an authority that a personal action would not lie upon "*a covenant* of warranty."

[2] In the Preface to the tenth volume of his Reports, Coke thus brings to the notice of his reader "Edward Seymor's case, concerning warranties, a cunning kind of learning (I assure you), and very necessary for the purchaser, for it armeth him not only with a sword by voucher to get the victory of recompense by recovery in value, but with a shield to defend a man's freehold and inheritance by way of rebutter; which title of the law is, in my

when applied to a mere personal covenant, and no case in England can be found in which to such a covenant or any other was ever given the operation of warranty by way of estoppel or rebutter.[1]

§ 114. But between warranty and the modern covenant there is another distinction than the mere form of the remedy. Warranty, when annexed to a freehold, possessed to a great degree the attributes of the covenants for seisin and of right to convey,[2] as is shown by the judgment *pro loco et tempore*.[3] And this was so whether the warranty was expressed in words or was implied from the words of grant. So too as respects a lease; "the word *demisi*

opinion, excellently curious, and curiously excellent. And yet, when you have read this case, you will concur with me that it was more weighty than difficult."

[1] "Can you produce any authority," asked that great judge, Sir George Jessel, M. R., of the counsel arguing the recent case of General Finance Co. *v.* Liberator Society, L. R. 10 Ch. Div. 18, "for the proposition that estoppel can be created by covenant?" and counsel could not. Cited in Bigelow on Estoppel (4th ed.), and see this case, *infra*, Ch. XI.

"There is a diversity," says Coke, "between a warranty that is a covenant real which bindeth the party to yield lands and tenements in recompense, and a covenant annexed to the land which is to yield but damages." Co. Litt. 384 *b*. In Jacock *v.* Gilliam, 3 Murph. (N. C.) 47, s. c. 4 Hawks, 310, a tenant in tail aliened with covenant of warranty, and it was argued that a discontinuance had been thus caused, and the issue in tail barred. "But," said Taylor, C. J., "the law has made a clear distinction between a covenant real and a covenant personal; and to a warranty alone, in the original and proper sense of the term, has it imparted the effect of intercepting the descent to the heir, because he, and not the executor, is bound to warrant and secure the land to the covenantee (warrantee) and his heirs. The use and adoption of the form in which the ancient warranty is expressed would indicate the intention of the parties to avail themselves of such remedies as appertain to the warranty only, and the change of that form will justify the reasonable inference that they designed to abide by the security which is afforded by covenant." So in Pollock *v.* Spiedel, 17 Ohio, 439, where the facts were similar, the court said: "Though the defendant here claims under a conveyance from the tenant in tail with covenants of warranty, yet the plaintiffs are not thereby estopped or barred of their action, because their title does not come from the warrantor as its source. Nor does it alter the case that they have received assets from the estate of the warranting ancestor. Modern covenants of warranty are regarded as personal only, and the remedy, on eviction, is by an action on the covenant against the grantor or his real or personal representatives, to recover in damages for the land lost." In Jacock *v.* Gilliam, it seems to have been doubted whether a discontinuance did not necessarily bar the issue in tail. Such, however, was not the case. Although the issue might be obliged to bring an action in order to get possession, yet in that action there was nothing in the warranty of the ancestor, since the statute *de donis*, to prevent a recovery. Butler's note to Co. Litt. 365. So Mr. Preston has said, "On the effect of fines, etc. by tenant in tail, the issues are not barred unless there is a common recovery, or fine with proclamation, or *in some special cases* a warranty." Preston's Law Tracts, 29. By the "special cases" is here meant those referred to *supra*, § 10. See further, as to the effect of a warranty by way of rebutter or estoppel when used in modern conveyances, Ch. XI.

[2] See Bricker *v.* Bricker, 11 Ohio, 245.

[3] See *supra*, § 11.

imports a power of letting, as *dedi* a power of giving,"[1] and although on the warranty implied by *dedi* a *warrantia chartæ* was the appropriate remedy, while on that implied by *demisi* the remedy was by covenant, yet this of course made no difference in principle, and as to neither of them was an eviction always necessary to a recovery.[2]

And at the present day it has often been urged, in cases of apparent hardship, that the modern covenant of warranty should do more than protect against "the consequences incident upon a defective title,"[3] and should, at least to some extent, comprise within itself the virtues of all the covenants for title; yet in the absence of peculiar local construction,[4] and, as has been

[1] Holder *v.* Taylor, Hob. 12. "Holder brought an action of covenant against Taylor, and declared for a lease for years made by the defendant by the word *demisi*, which imports a covenant; and then shows that at the time of the lease made the lessor was not seised of the land, but a stranger, and so the covenant in law broken. But he did not lay any actual entry by force of his lease, nor any ejectment of the stranger, nor any claiming under him, whereupon it was objected that no action of covenant would lie, because there was no expulsion. But the whole court was of opinion that an action did lie; for the breach of the covenant was in that the lessor had taken upon himself to demise that which he could not; for the word *demisi* imports a power of letting, as *dedi* a power of giving, and it is not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass. But if it were an express covenant for quiet enjoying, there perhaps it were otherwise." In Pincombe *v.* Rudge, id. 3, the action was on the warranty implied by the word *dedi*. See *supra*, p. 143.

[2] Pomfret *v.* Ricroft, 1 Saund. 322, note; Holder *v.* Taylor, *ubi supra;* Crouch *v.* Fowle, 9 N. H. 219; Grannis *v.* Clark, 8 Cow. (N. Y.) 36; Line *v.* Stephenson, 5 Bing. N. C. 183; see *infra*, Ch. XII.

[3] The definition of the covenant for quiet enjoyment, *supra*, § 91.

[4] Such as prevails in South Carolina, where, as was said in Moore *v.* Lanham, 3 Hill, 304, "The covenant of warranty has always been considered as broken whenever a paramount title could be shown in another, and it has been uniformly held that the vendee might bring covenant on the warranty, or resist an action for the price, without actual eviction; Pringle *v.* Whitten, 1 Bay, 256; Bell *v.* Huggins, id. 326; Sumter *v.* Welsh, 2 id. 558; Champness *v.* Johnson, 1809; Johnson *v.* Viscon, 1811; Furman *v.* Elmore, 1812; Mackey *v.* Collins, 2 N. & McC. 186;" and see also Faries *v.* Smith, 11 Rich. L. 82. So in Jeter *v.* Glenn, 9 id. 378, the court seemed to consider that it was "advancing the purpose of the legislature, promoting the usual intention of parties, and answering the ends of justice, to say that covenant of warranty contains all the five covenants which English conveyancers usually insert in conveyances in fee simple," except perhaps it was doubted of the covenant for further assurance. But since Jeter *v.* Glenn it has been said to have been consistently held that "the covenant of warranty embraces all the five English covenants, namely, that the vendor is seised in fee, that he has a right to convey, but the vendee shall quietly enjoy, and for further assurance." Welsh *v.* Kibler, 5 S. C. (N. S.) 405; Evans *v.* McLucas, 12 id. 62. The covenant for quiet enjoyment seems to receive the same construction there as elsewhere. Singleton *v.* Allen, 2 Strobh. Eq. R. 173; Jeter *v.* Glenn, *supra*.

The statutes by which the form and effect of the covenant of warranty have been regulated in many of the States are noticed *infra*, Ch. XII.

suggested, with the exception of a somewhat peculiar effect given to its operation by way of estoppel or rebutter,[1] such a construction is generally denied,[2] and the covenant of warranty is held to

[1] *Infra*, Ch. XI.

[2] Griffin *v.* Fairbrother, 1 Fairf. (Me.) 96; Witty *v.* Hightower, 12 Sm. & Marsh. (Miss.) 478; Blydenburgh *v.* Cotheal, 1 Duer, (N. Y.) 195; Vanderkarr *v.* Vanderkarr, 11 Johns. (N. Y.) 122; Greenvault *v.* Davis, 4 Hill, (N. Y.) 643; Rindskopf *v.* Farmers' Co., 58 Barb. S. C. (N. Y.) 49; Clarke *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 364; Patton *v.* McFarlane, 3 Pa. (old Pa., not Pa. St.) 422; Allison *v.* Allison, 1 Yerg. (Tenn.) 25; Crutcher *v.* Stump, 5 Hayw. (Tenn.) 100, overruling, said Catron, J., in Randolph *v.* Meeks, Mart. & Yerg. (Tenn.) 61, Talbot *v.* Bedford, Cooke, (Tenn.) 447, where Overton, J. had said, "The modern covenant to warrant and defend is inclusive of a covenant of seisin of an indefeasible estate, and of a right to convey, and, as to the mode of redress, of quiet enjoyment."

"The modern covenant of warranty," said Gibson, C. J., in Stewart *v.* West, 14 Pa. 338, "differs from the ancient warranty, not because the latter bound the feoffor to defend the land, but because it bound him to render, not damages, but a recompense in kind for a breach of it. The form of the writ, as well as the nature of the recompense in value, was different, but the measure of the obligation was the same. The feoffor was bound by his warranty to defend the land; the grantor is bound by his covenant to do as much, and no more, by defending the grantee from eviction on a superior title. By reason of its straitness, even this modern covenant of warranty has given place, in English conveyances, to the common covenants for title against particular defects, which it does not reach. In Pennsylvania it has been retained by unprofessed scriveners as a nostrum supposed to contain the virtues of the whole five; but its potency has not been recognized by the bench. The writ of *warrantia chartæ* was founded on an assize, or a writ of entry in the nature of an assize, brought against the feoffee; and the covenant of the feoffor was to warrant the land by defending the action. The modern writ of covenant is brought against the grantor to recover damages for a failure to do so. The *gravamen*, therefore, is not the defect of title, but the eviction consequent on it." And in Reed *v.* Hatch, 55 N. H. 336, it was considered that, where the other covenants for title (for seisin, quiet enjoyment, etc.) were contained in a deed, the addition of a covenant of warranty was "a meaningless and superfluous covenant."

In a note to the case of Paxson *v.* Lefferts, 3 Rawle, (Pa.) 68, from the pen of the father of the reporter, the difference between the warranty and the covenant is thus adverted to: "Warranty, in its original form, has long been abolished both here and in England. The more plain and pliable form of covenant has been substituted. The grantor for himself, his heirs, etc., covenants with the grantee, his heirs and assigns, that he and his heirs, executors, and administrators will warrant and defend the premises conveyed against himself, his heirs, etc., either generally or specially, as the parties agree. This is *prima facie* a covenant to do what in the old form was expressly done, and it might admit of a curious construction. If by the warranty in its original nature, the warrantor was obliged to render land only, the covenantor might, perhaps, be entitled to tender land as a compliance with his covenant, and might also avail himself of all the niceties and subtleties which characterized the ancient doctrine. It is true that in some cases damages were also recoverable by the warrantee. If a man be impleaded in assize, etc., and he brings a writ of *warrantia chartæ*, if the plaintiff recover his warranty, he shall recover his damages, and also to have the value of the land lost. Fitz. Nat. Brev. 315. But it would seem that the same rule did not take place if the warrantor was vouched, and not sued by *warrantia chartæ*. Br. Warr. Chart. 31. We have no reason to believe that in this State a covenantor ever attempted to discharge himself of the covenant to warrant and defend, by pleading

be simply a covenant for quiet enjoyment,[1] the only difference being that under the latter, as sometimes expressed, a recovery may be had where it would be denied under the former.[2]

that he was always ready to convey lands of equal value, or by showing that he had no notice of the eviction, and no demand of other land, etc. On the contrary, the covenant, like all other covenants, has always been held to sound in damages merely, which, after judgment, may be recovered out of the personal or real estate, as in other cases. If, indeed, the covenant admitted of such a construction, little advantage would be gained by it." The remainder of this note is quoted *infra*, Ch. XI.

[1] Emerson *v.* Proprietors, 1 Mass. 464; Caldwell *v.* Kirkpatrick, 6 Ala. 62; Fowler *v.* Poling, 2 Barb. S. C. (N. Y.) 303; s. c. 6 id. 165; Rea *v.* Minkler, 5 Lans. (N. Y.) 196; Athens *v.* Nale, 25 Ill. 198; Bostwick *v.* Williams, 36 id. 70; Reed *v.* Hatch, 55 N. H. 336.

In Peck *v.* Houghtaling, 35 Mich. 127, Graves, J., in delivering the opinion, said, "It may not be amiss to observe that authorities differ as to whether there is any real difference in the operation of these covenants [for quiet enjoyment and warranty]. Mr. Rawle appears to consider them sufficiently distinguishable to forbid the introduction of one of them to maintain an averment of the other. Chancellor Kent lays it down that a covenant to warrant and defend is in effect a covenant for quiet enjoyment. It would scarcely be safe, however, to assume this to mean that either may be pleaded and the other given in evidence in covenant to support the allegation. Whatever may be the true doctrine, it is far safer, to say the least, to plead the covenant according to the form of it in the deed, and leave the effect to be eventually ascertained without raising any embarrassing question of variance."

It is not believed that there is the least difference of opinion between the two writers. The author of this treatise meant no more than that when there had been an alleged breach of one covenant, it would be a variance if the deed contained another; and it is not probable that the distinguished Chancellor, who was speaking of the *substantial* similarity of the covenants, ever thought that it extended to the technicalities of pleading. And such too seems to have been the opinion of the learned judge in the case cited.

[2] A striking illustration is shown in the case of Dobbins *v.* Brown, 12 Pa. 75, (*infra*, p. 204, n. 2,) in which a recovery was denied upon the covenant of warranty, though it is evident that had the covenant been one for quiet enjoyment the plaintiff must have recovered.

The cases which give a greater effect to the covenant of warranty than to the covenant for quiet enjoyment will be found on examination to depend upon the peculiar wording of the former covenant. Thus in Williams *v.* Wetherbee, 1 Aik. (Verm.) 240, where the covenant was "to warrant and defend against all lawful claims of all persons," it seems to have been thought sufficient that a judgment had been recovered under the paramount title in an ejectment of which the covenantor had notice; in other words, that the mere omission to "warrant and defend" the land was a final breach, and such was the view taken in Drury *v.* Shumway, D. Chip. (Verm.) 110, where, however, the form of the covenant is not given. "The last objection supposes," said the court in the former case, "that a final recovery in ejectment by a title adverse and paramount is not a breach of this covenant, but that the plaintiff must have been actually turned out by writ of possession. In support of this, it is said that a covenant of warranty is the same in effect as a covenant for quiet enjoyment. But we regard a covenant of this description as something more than one for quiet enjoyment. It is a covenant to defend, not the possession merely, but the land and the estate in it. Upon this occasion we are to suppose the title derived from the defendant to have been fairly litigated and adjudged insufficient. The after ceremony of turning the plaintiff out of possession, being an act beyond the control of either of these parties, and depending wholly upon the pleasure of a stranger, ought not to

§ 115. So, too, with respect to a covenant already noticed as sometimes employed on this side of the Atlantic, but rarely, if ever, in England, called the covenant of non-claim.[1] As a general rule, no distinction has in any way been taken between this covenant, and the ordinary covenant of warranty. Both are, in general, held to have the same operation by way of estoppel,[2] both equally possess the capacity of running with the land,[3] and confer the same rights as to a recovery in damages. As to the estoppel, however, a contrary opinion has been expressed in Maine,[4] in a case whose peculiar circumstances were such that the enforcement under such a covenant of the doctrine of estoppel as generally considered to exist throughout the New England States,

affect the present remedy of the plaintiff. He has the stipulation of the defendant that he shall forever hold this land, in the character in which he purchased it, as a freeholder in fee simple, and this stipulation must not be violated, when the plaintiff is divested of all estate and left in a precarious occupancy, as a trespasser to a third person." And this decision was cited and approved in the recent case of Russ *v.* Steele, 40 Verm. 310, where the covenant was similar.

[1] See *supra*, § 22.

[2] Gee *v.* Moore, 14 Cal. 472; Holbrook *v.* Debo, 99 Ill. 372; Fairbanks *v.* Williamson, 7 Greenl. (Me.) 99; Trull *v.* Eastman, 3 Met. (Mass.) 121; Gibbs *v.* Thayer, 6 Cush. (Mass.) 33; Miller *v.* Ewing, id. 40; Kimball *v.* Blaisdell, 5 N. H. 533; Everts *v.* Brown, 1 D. Chip. (Verm.) 99; and see these cases considered *infra*, Ch. XI.

[3] Claunch *v.* Allen, 12 Ala. 163; Trull *v.* Eastman, *supra;* Bostwick *v.* Williams, 36 Ill. 70; Newcomb *v.* Presbrey, 8 Met. (Mass.) 406, where Wilde, J., in delivering the opinion of the court, said: "It is not stated in the report of the case that the deed to the demandant contained any covenant of warranty, and it has been argued by counsel on the assumption that it was a mere quitclaim deed; but on looking into that deed we find that it contains an express covenant of warranty against all persons claiming from or under the said S. Presbrey. The words of the habendum are, 'to have and to hold the afore-mentioned premises to the said Newcomb his heirs and assigns forever, so that neither I the said Presbrey nor my heirs nor any other person or persons claiming from or under me shall or will by any way or means have, claim, or demand any right or title to the aforesaid premises.' That this clause in the deed amounts to a covenant of warranty, or of quiet enjoyment, against all persons claiming title under or from Presbrey, cannot admit of a doubt. To constitute a covenant it is not necessary that the word 'covenant,' or any other particular word or words, should be made use of; for any words in a deed, in what part soever found, from which the intent of the parties to enter into an engagement can be collected, are sufficient for that purpose." So where in Gibbs *v.* Thayer, 6 Cush. (Mass.) 32, the covenant of non-claim was limited to the grantor and his heirs, it was said: "This clause constitutes a covenant of warranty, to the extent of its import. It differs from a general warranty in this, that one is a warranty against any and all paramount titles, the other against the grantor himself, and all persons claiming under him." And in Lothrop *v.* Snell, 11 id. 453, and Porter *v.* Sullivan, 7 Gray, (Mass.) 441, the same view was taken.

[4] Pike *v.* Galvin, 29 Me. 187, overruling Fairbanks *v.* Williamson and White *v.* Erskine, *supra;* and see the dissenting opinion of Mr. Justice Wells, in 30 id. 539.

would have rendered the decision one of great hardship, and it was held that the covenant of non-claim did not operate by way of estoppel or rebutter, and did not pass with the land to an assignee, and the same doctrine has been since recognized and applied in the same State.[1] The doctrine upon which these decisions are said to rest will be considered in a subsequent part of this treatise.[2]

§ 116. It will be observed that the covenant of warranty is a literal translation of the ancient form of warranty, with merely the addition of words of covenant. Littleton tells us that although the words "warrant and forever defend" were those generally inserted in a warranty, yet that the word "defend" added no additional force, as "it seemeth that it hath not the effect of warrantie, nor comprehendeth in it the cause of warrantie."[3] The form, however, "warrant and forever defend," seems to have come into general use, and it has descended to the present time.

Apart from the word "warrant," the covenant would seem to be no more than an engagement that it should bar the covenantor and his heirs from ever claiming the estate, and that he and they should undertake to defend it when assailed by paramount title.[4] The latter was, indeed, one of the consequences of a warranty, and its effect in this respect has been continued, though with modifications, down to this day.

The ancient practice of vouching to warranty has already been referred to. By the common law there was a regular writ, a *summoneas ad warrantizandum*, "whereupon, if the sheriff returned that the voucher is summoned and he make default, then a *magne cape ad valentiam* is awarded;"[5] and although these writs had

[1] Partridge *v.* Patten, 33 Me. 483. In Cole *v.* Lee, 30 id. 396, 397, however, no distinction was observed between the covenants of non-claim and of warranty.

[2] *Infra*, Ch. XI.

[3] Litt. § 733. Of this, Coke says, "It appears that neither *defendere* nor *acquietare* doth create a warrantie, but *warrantizare* only. And as *Ego et hæredes mei warrantizabimus*, etc., in Latin, do create a warrantie, so 'I and my heirs shall warrant,' etc., in English, doth create a warrantie also." Co. Litt. 382 *b*.

[4] Stewart *v.* West, 14 Pa. 338.

[5] Co. Litt. 101. In actions where voucher was not admissible, the practice was not unlike our own, for, says Markham, C. J., in Year Book 8 Edw. IV. 11, "If I recover from my warrantor a judgment *pro loco et tempore*, and then am impleaded in an action in which I cannot vouch, as an assize or *scire facias*, it is competent for me to request him from whom I have thus recovered to put in a plea for me, and thus give him notice of the action that is pending, as otherwise I shall not be allowed to have execution on my judgment;" and see generally, as to the common law warranty, Ch. I.

become obsolete in England more than two centuries before they were abolished by statute, yet upon general principles notice of an adverse proceeding is there considered obviously proper in all cases where one having the benefit of any covenant of indemnity seeks to fix the liability of the covenantor by the same suit which decides his own.[1]

§ 117. Partly upon this general principle, and partly in analogy to the practice under the old warranty, it has come to be well settled in most if not all of the United States, that in general, upon suit being brought upon a paramount claim against one who is entitled to the benefit of any of the covenants for title, and more particularly it would seem of the covenant of warranty, he can, by giving proper notice of the action to the party bound by the covenants and requiring him to defend it, relieve himself from the burden of being obliged afterward to prove, in the action on the covenants, the validity of the title of the adverse claimant;[2]

[1] Duffield *v.* Scott, 3 Term, 376; Smith *v.* Compton, 3 Barn. & Adolph. 189, 407; Rolph *v.* Crouch, L. R. 3 Ex. 44; Beck *v.* Barlow, 1 Allen, (N. B.) 465.

Pomery *v.* Partington, 3 Term, 665, was an action upon "a covenant warranting title" in a lease. In a note to page 668, the reporter says, "A preliminary objection was taken, viz. that the defendants were estopped from insisting on the title of M. G., because he had notice of the ejectment brought against the plaintiff, and neglected to defend his title; but as the judgment of the court was founded on the principal question only, it is thought unnecessary to enter into this and other minute points, which were stated in the course of the argument." "When a person is responsible to another," said Bell, J., in Littleton *v.* Richardson, 34 N. H. 187, "either by the operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon himself the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party on the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." *Accord.* Boston *v.* Worthington, 10 Gray, (Mass.) 498; Chamberlain *v.* Preble, 11 Allen, (Mass.) 373.

[2] Graham *v.* Tankersley, 15 Ala. 634; Boyd *v.* Whitfield, 19 Ark. 469; Hinds *v.* Allen, 34 Conn. 195; Wimberly *v.* Collier, 32 Ga. 13; Morgan *v.* Muldoon, 82 Ind. 347; Bever *v.* North, 107 id. 544; Booker *v.* Bell, 3 Bibb, (Ky.) 173; Prewit *v.* Kenton, id. 282; Cox *v.* Strode, 4 id. 4; Jones *v.* Waggoner, 7 J. J. Marsh. (Ky.) 144; Williamson *v.* Williamson, 71 Me. 442; Hamilton *v.* Cutts, 4 Mass. 353; Merritt *v.* Morse, 108 id. 270; Mason *v.* Kellogg, 38 Mich. 132; Cummings *v.* Harrison, 57 Miss. 275; City of St. Louis *v.* Bissell, 46 Mo. 157; Morris *v.* Rowan, 2 Harr. (N. J.) 307; Chapman *v.* Holmes, 5 Halst. (N. J.) 20; Cooper *v.* Watson, 10 Wend. (N. Y.) 205; Miner *v.* Clark, 15 id. 427; Kelly *v.* The Dutch Church, 2 Hill, (N. Y.) 105; Adams *v.* Conover, 22 Hun, (N. Y.) 424 (where parol evidence was admitted to show what in fact was litigated in the adverse suit); Dalton *v.* Bowker, 8 Nev. 190; King *v.* Kerr, 5 Ohio, 158; Smith *v.* Dixon, 27 id. 471; Swenk *v.* Stout, 2 Yeates, (Pa.) 470; Bender *v.* Fromberger, 4 Dallas, (Pa.) 436; Leather *v.* Poulteny, 4 Binn. (Pa.) 356;

nor, in the absence of fraud or collusion, will the covenantor, under such circumstances, be allowed, in the latter action, to prove that the recovery against his covenantee was not had under paramount title.[1]

§ 118. Cases, moreover, have at times been presented in which the covenantee, having in the first instance failed to acquire possession of the subject of the purchase, and having himself brought suit upon the title conveyed by his vendor, has notified the latter

Collingwood *v.* Irwin, 3 Watts, (Pa.) 310; Ives *v.* Niles, 5 id. 323; Paul *v.* Witman, 3 Watts & Serg. (Pa.) 409; Terry *v.* Drabenstadt, 68 Pa. 400; Wilson *v.* McElwee, 1 Strob. (S. C.) 65; Davis *v.* Wilbourne, 1 Hill, (S. C.) 28; Middleton *v.* Thompson, 1 Spears, (S. C.) 67; Williams *v.* Burg, 9 Lea, (Tenn.) 455; Williams *v.* Wetherbee, 2 Aik. (Verm.) 337; Park *v.* Bates, 12 Verm. 381; Pitkin *v.* Leavitt, 13 id. 279; Brown *v.* Taylor, id. 631; Turner *v.* Goodrich, 26 id. 708; Wendel *v.* North, 24 Wis. 223; Somers *v.* Schmidt, id. 419; Eaton *v.* Lyman, 24 id. 438; and see 2 American Leading Cases (5th ed.), 419, note to United States *v.* Howell; as also 2 Wait's Actions and Defences, 392. A covenantor has, however, it seems, no right to insist on being placed on the record as a defendant in the suit brought upon the adverse title; Linderman *v.* Berg, 12 Pa. 301; and the grantor is not bound to permit him to defend; Boyce *v.* Edwards, 114 Mass. 373. In pleading, it is of course unnecessary to aver that the covenantor was notified to defend. Bever *v.* North, 107 Ind. 544.

[1] McConnell *v.* Downs, 48 Ill. 271; Sisk *v.* Woodruff, 15 id. 15; unless, it may be, to show that the recovery was under title from the covenantee himself.

In North Carolina alone (unless the decisions are based upon some local usage, for the common law has in none of our States been more clearly understood or expounded) does a contrary opinion seem to prevail. In Martin *v.* Cowles, 2 Dev. & Batt. 101, the court said: "The only question on this appeal is, whether, in an action brought by a vendee against his vendor for a breach of the covenant for quiet enjoyment, a recovery in ejectment by a third person against the vendee, effected with notice to the vendor of the pendency of the ejectment, is conclusive evidence of the title of the lessor of the plaintiff. We have no hesitation in answering this question in the negative. In our opinion, the record of the judgment is not only not conclusive evidence, but it is not any evidence of title against the vendor. It would be repugnant to principle to bind any one by a judgment in a suit, where, if an opposing judgment had been rendered, he could derive no benefit from it, to which suit he was not a party nor had it in his power to become a party, and where he could not challenge the inquest, nor examine witnesses, nor exercise any of the means provided by law for ascertaining the truth and asserting his right. In real actions, a warrantor might be made a party by voucher; in ejectment, a landlord may come in to defend the possession of his tenant; but there is no provision in law by which a vendor can be brought in to vindicate the possession of his vendee. To a judgment against the vendee the vendor is a stranger, and therefore that judgment is, against him, evidence only of the fact of the judgment, and of the damages and costs recovered. Saunders *v.* Hamilton, 2 Hay. Rep. 282, Shober *v.* Robinson, 2 Murph. Rep. 33, and Williams *v.* Shaw, N. C. Term Rep. 197, all recognize this doctrine; and whatever opinions may have once been entertained, we had thought that for many years back it had been perfectly settled." In the later case of Wilder *v.* Ireland, 8 Jones L. (N. C.) 88, this decision was recognized and approved. In neither of these cases was the adverse title even supposed to be derived from the covenantee himself.

to appear and prosecute that suit, and in the event of his failure to do so has sought to make the judgment conclusive upon him. In a somewhat recent case in Tennessee the right of the covenantee thus to bind his covenantor was denied; it was said that provision was made by law for making the covenantor the *defendant* in the adverse action, but that no precedent could be found in which the converse of the rule was applied in making the covenantor a *plaintiff*, and the question of title was therefore considered still an open one in the action on the covenant.[1] But in Vermont the law has been differently decided, and it has been held, apparently with more reason, that upon a suit brought by the covenantee to recover the possession, a notice duly given by him to the covenantor would have the effect of making the result of that suit conclusive upon the latter;[2] and in recent cases elsewhere the same view has been taken.[3]

§ 119. What, then, is a proper notice of the suit brought under the adverse title?

In Pennsylvania it has for many years been held that "to have the effect of depriving the warrantor of the right to show title, the notice should be unequivocal, certain, and explicit; a knowledge of the action and a notice to attend the trial will not do,

[1] Ferrell *v.* Alder, 8 Humph. (Tenn.) 44.

[2] In Park *v.* Bates, 12 Verm. 381, the question was passed over without particular notice by the court; but it was settled in Pitkin *v.* Leavitt, 13 id. 379, and Brown *v.* Taylor, id. 637. So, by the Louisiana Code, "When the purchaser is himself obliged to commence judicial proceedings against a person disturbing his possession, he ought to notify his vendor of the action which he is commencing, and the vendor, whether he undertake to conduct the suit for him or not, is obliged to indemnify fully, in case of condemnation." Art. 2495.

[3] Gragg *v.* Richardson, 25 Ga. 570; White *v.* Williams, 13 Tex. 258. "In the ordinary case," said the court in Gragg *v.* Richardson, "the purchaser after getting possession is turned out of it by a writ against him, of which his warrantor has notice; in the present case, the purchaser can never get possession, not even by the aid of a writ of which his warrantor has notice, and in the prosecution of which he takes part. The chance which the warrantor in the one case has of asserting his title is as good as the chance which the warrantor in the other case has of asserting his title; the purchaser who is prevented from ever getting the possession is at least as badly off as the purchaser who having got the possession is turned out of it; a judgment against the purchaser when he brings the ejectment and vouches his warrantor is as much evidence of an adverse title paramount to the warrantor's as is the judgment when the ejectment is brought against the purchaser, and he vouches the warrantor. There is therefore no substantial difference between the ordinary case and the present case." The Revised Statutes of Texas (1879, p. 703. art, 4788) provide that when a party is sued for lands, the real owner or warrantor may make himself or may be made a party defendant in the suit, and shall be entitled to make such defence as if he had been the original defendant in the action.

unless it is attended with express notice that he will be required to defend the title;" [1] and the same view has been taken in recent cases elsewhere.[2]

It has not been consistently settled whether the notice should be in writing or not. In a case in New York, decided in 1836, a written notice was held unnecessary. "A parol notice," the court said, "gives the information to the grantor quite as well as a written one, and as there is no technical rule requiring such a notice to be in writing, no writing is necessary." [3] From this, however, Bronson, J. dissented, saying, "This is not like a notice which will sometimes affect the title of a party by showing it tainted with fraud. In these cases, notice means only knowledge of a particular fact, . . . and in general it is a matter of no moment in what form the information was received, or from what source it was derived. But here the notice, if it is to have any effect, is in itself a legal proceeding. It advises the warrantor that the title which he professed to grant is called in question." And after referring to the old practice of voucher by a writ of summons, he proceeded to say, "As in the one case, the right could only be asserted by means of a writ served by a public officer, he ought not, in the other, to be prejudiced by anything less definite and formal than a writing which will advise him of what has been done, and what he is required to do." In a late case in Mississippi, it was briefly held that the notice "need not be in writing or in any particular form." [4] In a case in Nebraska,[5] no opinion was expressed whether the notice should be in writing. But lately in Michigan, the remarks of Bronson, J. were cited with approbation, and it was distinctly held, both upon general analogies and upon that with regard to voucher in warranty, that the notice must be in writing.[6] And while on the one hand it

[1] Paul *v.* Witman, 3 Watts & Serg. 410.

[2] Boyd *v.* Whitfield, 19 Ark. 470; Somers *v.* Schmidt, 24 Wis. 421; Collins *v.* Baker, 6 Mo. App. (Appendix), 588.

[3] Miner *v.* Clark, 15 Wend. 427, notwithstanding it had been generally said in Gilbert *v.* The Turnpike Company, 3 Johns. Cas. 108, and *In re* Cooper, 15 Johns. 533, "a notice in legal proceedings means a written notice."

[4] Cummings *v.* Harrison, 57 Miss. 275.

[5] Dalton *v.* Bowker, 8 Neb. 200.

[6] Mason *v.* Kellogg, 38 Mich. 132. In the late case in Tennessee of Greenlaw *v.* Williams, 2 Lea, 533, the notice was evidently written, and the court held that although it should be distinct and unequivocal, and require the covenantor to defend the suit (citing the text) yet that it need not be of record in any particular form of words. In Terry *v.* Drabenstadt, 68 Pa. 400, it is not distinctly said that the notice should be in writing, but, as in Paul *v.* Witman, *supra*, the ancient prac-

would seem an extreme measure to cast upon the plaintiff the burden of proof merely because the notice given to the defendant, no matter how "unequivocal, certain, and explicit," and no matter how clearly brought home to him, was not in writing, yet the more rigid ruling is not only supported by analogy to the former practice, but has the merit of being conducive to certainty in a proceeding whose effect is conclusive upon a question of title;[1] and as it has been somewhat recently held in Vermont that in

tice of vouching to warranty was referred to, and it was said, "The substitution of the modern covenant for the ancient warranty ought not to change, and practically it has not changed, the rights and obligations of the respective parties."

[1] In Somers *v.* Schmidt, 24 Wis. 417, the covenantor had *knowledge* of the adverse suit, but not the express *notice* required in Paul *v.* Witman, and the court said: "The language in that case (Paul *v.* Witman) is quoted with approbation by Mr. Rawle, and although his conclusion may not be that notice in writing is necessary in order to bind the warrantor by the judgment, yet it very clearly is that it should in all cases come from the warrantee or party relying on the covenant, or be given under his direction or authority, and should be to the effect that the warrantor is required to defend the title. In Miner *v.* Clark (15 Wend. 425) it was held by a majority of the court that a verbal notice of the suit to the grantor, with a request to him to attend to the defence, was sufficient. Such is undoubtedly the rule which has been held in all cases of this nature; and we know of none where it has been decided that notice *aliunde*, or mere knowledge of the suit incidentally acquired through third persons, was sufficient, and the rule is a reasonable and just one. It requires no more of the warrantee or tenant in possession than he ought to be willing to perform if he desires to charge the warrantor with the effect of an estoppel by judgment. It is in harmony with the principle on which such estoppels rest. The warrantor, being notified of the suit, and having the defence tendered to him so far as it may be necessary for him to establish his title, if he had one, becomes a *quasi* party to the suit, has his day in court, and ought to be concluded by the judgment. But without such notice and a request to defend, he has no such opportunity, and ought not to be estopped. And when we consider this principle upon which the judgment is held conclusive against the warrantor, and the rule which almost universally prevails in judicial proceedings, that notices must be in writing, it would seem that Judge Bronson was not so very far wrong in Miner *v.* Clark, when he insisted that this also should be written. And especially would this seem proper where it is held, as it has been in some of the States, that notice to the warrantor in his lifetime is sufficient to bind his legal representatives after his decease, without the giving of further or other notice to such representatives. This was so held in Brown *v.* Taylor, 13 Verm. 631; but the notice there was in writing. But as it appears to be settled that verbal notice is sufficient, we are not disposed to part from that rule, though we might wish, for the sake of greater convenience and certainty, that it had been otherwise established. If, on the other hand, upon mere knowledge of the suit, however acquired, the warrantor would be authorized to come in and assume to conduct the defence so far as the proof of his own title was concerned, there might be some reason for holding him bound by such knowledge. But without the assent of the defendant in the suit he has no such authority. It is *res inter alios acta*, and if he should apply to the court for permission to defend, the defendant not having voluntarily offered it, the answer would be that he had no occasion to do so, since his rights could not be affected by the judgment."

case of the death of the covenantor no further notice need be given to his representatives,[1] some hardship might ensue if a verbal notice were suffered to bind the former in the first instance, as such a message resting in parol may leave no trace behind it, while if written something might still be in existence to warn or notify them.[2]

Practically, the question need not be embarrassing, for if the plaintiff have taken the precaution of being prepared with proof of the paramount title, he can afford the rejection by the court of proof of his unwritten notice. Like the whole of this matter of notice, it is simply a question of saving trouble.

§ 120. To some extent the question of notice is matter for the jury. Although it is the province of the court to determine what is and what is not a proper and sufficient notice as to time[3] and

[1] Brown *v.* Taylor, 13 Verm. 631. "We are of opinion," said the court, "that the plaintiffs, having commenced an action of ejectment against a person in possession of the lands deeded and warranted to them by McDaniel, and having given notice thereof to McDaniel in his lifetime, were not required to do anything further in order eventually to charge him or his legal representatives with the consequences of a failure to establish a title in them to the lands conveyed. On serving that notice, it became the duty of McDaniel to make proof of his title in that action, and this duty devolved upon his legal representatives without any further notice from the plaintiff." In this case, however, not only was the notice written, but the covenantor had appeared by counsel in the cause.

[2] In Chamberlain *v.* Preble, 11 Allen, (Mass.) 373, it was said, "The strict formalities required in the writ of *warrantia chartæ* and voucher, as used in the ancient common law warranty, are not required to render the judgment conclusive in an action upon the modern covenant of warranty. The question in these cases usually is whether the defendant has had reasonable notice of the suit, and an opportunity to defend it. If he has, he is bound by the proceedings. It is not necessary that the notice should appear of record; and no particular form of words is necessary. In some cases a verbal notice has been held sufficient; in others the presence of the defendant and his participation in the defence have been enough to render the judgment conclusive. In this case, B. (the original covenantee and the grantor of the plaintiff), having assumed the defence and employed counsel, was acting with the consent and at the request of the present plaintiff, C., and it is perhaps a sufficient answer to the defendant's objection, that, while that relation existed, B. is to be regarded as having been the attorney and agent of C. to do all that properly pertained to the defence of that suit. By assuming the defence, B. became privy, if not a party, to that judgment, and pending the suit a notice from him to the defendant, it seems to us, was quite as proper and effectual as if given in the name of C. Under such a notice, with an opportunity to appear and defend, he cannot be deemed a stranger to these proceedings. Miner *v.* Clark, 15 Wend. 427."

[3] The judgment would not be conclusive upon the party bound by the covenant, if the notice were not given in reasonable time; Somers *v.* Schmidt, 24 Wis. 421, *supra*, p. 156, n. 1; nor unless the latter were allowed to have the benefit of all defences to the action which his covenantee might have made, including, it has been held, the right to a new trial upon

certainty, yet the fact of its reception seems to be within the province of the jury,[1] except in the single case where the party

payment of costs; Eaton *v.* Lyman, 26 id. 62. This case was much litigated; Eaton *v.* Lyman, 24 id. 438; 26 id. 62; 28 id. 324. In the last of these cases the mooted question as to notice was not brought up by the record, and the judgment was reversed on a question of damages. The following remarks in Davis *v.* Wilbourne, 1 Hill, (S. C.) 28, as to the local rules on this subject in South Carolina, were approvingly quoted in Middleton *v.* Thompson, 1 Spears, (S. C.) 69: "Notice in cases within the summary jurisdiction should be given at or before the return of the process — in cases within the general jurisdiction, notice at any time before the expiration of the rule to plead. The object is to enable the warrantor to come in and defend his title. He ought, therefore, to have reasonable time to prepare for it, and the time which the law allows to a defendant furnishes perhaps the safest rule. In the first class of cases, however, the process might be served on the last hour of the last day before the return, so as to render the service of the notice impracticable before the return. In these cases notice within a reasonable time afterward would be all that could be expected. So where the warrantee has entered an appearance, and put in his plea to the merits, I should think that notice, even after the continuance, if the warrantor had time to prepare evidence for the trial, would be sufficient."

[1] Such at least was the determination in Collingwood *v.* Irwin, 3 Watts, (Pa.) 310, where the former had conveyed to the latter with covenant of warranty, and the latter had been dispossessed, under a judgment in ejectment obtained against him by one Robinson. "The third proposition," said Kennedy, J., who delivered the opinion of the court, "offered to be proved was that the title of Irwin to the land under the deed of conveyance, made to him by the plaintiff in error, was better than that of Robinson's, under which he was evicted from the land. The testimony was clearly admissible; for the plaintiff in error was no party on the record to the judgment in ejectment, under which Irwin was turned out of possession of the land. The judgment in ejectment was therefore only *prima facie* evidence, as against the plaintiff in error, of Robinson's title to the land being better than that of Irwin's; but it is alleged that the plaintiff in error had notice of the commencement and pendency of the action of ejectment, and is therefore concluded by the judgment rendered in it in favor of Robinson's title. Supposing this to be so, how does it appear that he had such notice? Certainly not by any exhibition of the record of the action of ejectment, and the judgment given in it; because, as already observed, he is not a party on the record of it; neither does it appear by any admission of his, placed upon the record of this suit. Whether he had such notice or not was then a matter *in pais*, and became a question of fact, to be decided by the jury, and not by the court; but the court, by rejecting the evidence on this ground, must necessarily have decided on the fact that the plaintiff in error had such notice. Under this point of view, I apprehend the court erred; for even in case evidence of a regular notice from Irwin to Collingwood of the action of ejectment being brought against him, with a request to appear and defend against it, had been given by Irwin, still as long as such notice and request were not admitted by Collingwood, it was the duty of the court below to have admitted the evidence in regard to the title to the land, and afterward to have directed the jury that if, from the evidence, they believed that Collingwood was notified by Irwin or his attorney of the action of the ejectment being brought, and was requested likewise to appear and defend against it, they were to consider him bound and concluded by the judgment rendered in it; and whether Irwin had a better title to the land than Robinson or not was a question which they could not decide according to any opinion of their own, which they might form by an examination of their respective titles, but were bound to decide it according to the judgment given upon it

bound by the covenant is made a party to or has placed himself upon the record of the adverse suit. Indeed, unless the party bound by the covenant is so notified that he becomes, either actually or constructively, the party to the suit by which the land is sought to be recovered from the covenantee, there is no room for the application of the rule that the judgment of a court of competent jurisdiction cannot be inquired into collaterally; for the exception is as well settled as the rule itself, that the rule applies only to those who are said to be parties or privies to the action. Where the covenantor is properly notified, he becomes the latter, if not the former.[1] Where he is not thus notified, the rule loses its application.

§ 121. But the mere fact of making a notice of an adverse suit conclusive upon a covenantor in a subsequent action against him might, in many cases, work injustice. Evidence of the title under which the recovery was had might not, and in most cases probably would not appear upon the record, and yet that title might

in the action of ejectment." As, therefore, it did not appear that the notice in this case was as unequivocal, certain, and explicit as it was afterwards said in Paul *v.* Witman, 3 Watts & Serg. (Pa.) 407, that a notice ought to be, but was in some degree calculated to mislead, it was held that the question of title was fairly open to be decided according to the whole evidence which might have been given at the trial by both parties.

[1] Paul *v.* Witman, 3 Watts & Serg. (Pa.) 407. A good illustration of the text will be found in Chamberlain *v.* Preble, 11 Allen, (Mass.) 370, already cited *supra*, p. 157, n. 2. The land in question had been conveyed by Preble, the defendant, to Baldwin, with a covenant of warranty, and by Baldwin to Chamberlain, the plaintiff. Comer, who had been an alien, claimed the land by title paramount as tenant by the curtesy, and on the trial (in which Preble, the covenantor took no part) the case was decided in Comer's favor (Comer *v.* Chamberlain, 6 Allen, 166), upon an agreed state of facts, in which the true date of Comer's naturalization was innocently misstated. The defendant, Preble, contended that as Comer's wife had conveyed the land before the true date of her husband's naturalization he could not be tenant by the curtesy and therefore could not have recovered, and so the plaintiff virtually admitted a fact which did not exist and was material in the case. But the court, premising that if the plaintiff had *without suit* acknowledged the title of Comer, and paid the amount required to extinguish it, he would have done so at his peril and could not now prevail against the defendant without proving the paramount title of Comer, held that as Preble, though notified to defend the original suit, had paid no attention to the notice, but had permitted judgment to be recovered for want of evidence within his own knowledge by which the misstatement of facts might have been corrected, he could not afterward, as a defence to the suit at bar, allege the misstatement — made as it was without fraud or collusion and equivalent to an agreement of counsel upon a fact at a trial — as ground for impeaching the judgment. And the court observed that according to Jackson *v.* Marsh, 5 Wend. (N. Y.) 44, even judgment by default against a covenantee who has notified his covenantor to defend seems to be conclusive.

be one derived from the covenantee himself subsequent to the purchase. To exclude evidence of this, notwithstanding a notice, would be obviously improper.[1] The only question which therefore arises is as to the burden of proof. On whom is this to be thrown, when the record does not on its face set forth the title?

§ 122. So far as the plaintiff in his action on the covenant must, notwithstanding a notice given by him, affirmatively show by evidence *dehors* the record that the recovery against him was under a title not derived from himself, the question admits of easy solution. It has been seen that in a declaration for a breach of the covenant for quiet enjoyment it is necessary to allege not merely that the eviction was made under paramount title, but that such title was "existing before and at the time of the conveyance to the plaintiff," as the eviction might indeed be under a paramount title, but one which had been derived from the plaintiff himself, for which of course his covenantor would not be responsible.[2] The same doctrine may be applied as to notice. Beyond this point, it does not seem necessary for the plaintiff to go. Where he has given a sufficient notice, it is believed to be enough if he show that the title under which the adverse judgment was obtained, was not one derived subsequent to the execution of the deed to himself.[3]

[1] Booker *v.* Bell, 3 Bibb, (Ky.) 175; Swazey *v.* Brooks, 30 id. 692; Wilson *v.* McElwee, 1 Strob. (S. C.) 66; Pitkin *v.* Leavitt, 13 Verm. 384; Adams *v.* Conover, 22 Hun, (N. Y.) 424.

[2] See *infra*, p. 167.

[3] Phelps *v.* Sawyer, 1 Aik. (Verm.) 157; Booker *v.* Bell, 3 Bibb, (Ky.) 175; Swenk *v.* Stout, 2 Yeates, (Pa.) 470, though judgment was in this case given for the plaintiff, on the ground that all the facts averred in the declaration must, on demurrer, be taken as true. Thus in Kelly *v.* Dutch Church, 2 Hill, (N. Y.) 113, Bronson, J., said: "But it is said that as the defendants had notice, and were requested to defend the ejectment suits, they are now estopped from setting up their title, and that question remains to be considered. Whether the defendants took part and aided the plaintiff in the defence of the suits brought against him does not appear, but they must at least have furnished him with the means of setting up their title, for it was given in evidence on the trial. And this case is, I think, plainly distinguishable from those to which we have been referred in relation to the effect of notice, for the reason that the defendant's title was not only in evidence in the former suits, but it was virtually admitted to be a good title. The plaintiffs in those actions did not recover on the ground that their right was superior to that of the Dutch Church, but on the ground that the defendant in those suits was precluded by the acts and declarations of his immediate grantors from sheltering himself under the good title of the church. If the defendants, on receiving notice of a suit upon a title apparently superior to theirs, had neglected to appear and defend, and their title had not been given in evidence, or if, when in evidence, it had been ad-

§ 123. The next question is as to the effect of a judgment where there has been *no* notice to the party bound by the covenant of the suit upon which that judgment is founded. It seems to have been thought on the one hand, that on the presumption of *omnia rite acta* the record of the adverse suit is of itself *prima facie* evidence that the title on which the judgment therein is based is a paramount one, it being, however, perfectly competent for the defendant to inquire into the merits of that judgment.[1] But the weight of authority inclines to the position that although the record of the adverse proceeding may be evidence of *eviction*,[2]

judged defective, they would probably be estopped from setting it up in answer to an action on the covenants. But that is not this case. There is a short and I think conclusive view of this question. The plaintiff had necessarily averred that he was evicted by persons having a title paramount to that of the defendants. Upon that averment issue has been joined. The plaintiff holds the affirmative, *and the burden of proof lies upon him.* He has not only failed to prove the averment true, but in attempting to do so he has proved it false. It was not enough for the plaintiff to show that he gave the defendants notice of the suits brought against him, for the obvious reason that the claimants may have recovered on a right or title subordinate to that of the defendants. It was necessary, therefore, for the plaintiff to go further, and show on what ground the claimants succeeded. He did so, and the evidence has proved fatal to his cause." The decision in Buckels *v.* Mouzon, 1 Strob. (S. C.) 448, proceeded in effect upon the same grounds.

It has, however, been decided that when judgment has been once recovered against the covenantor, equity will not enjoin that judgment on the ground of the eviction not having been by title paramount, that being a fact exclusively cognizable by the common law courts. Yelton *v.* Hawkins, 2 J. J. Marsh. (Ky.) 1. There is indeed a suggestion toward the latter part of the decision, that "the utmost the Chancellor could have done was to have decreed a new trial, on the establishment of facts sufficient for that purpose," but this, it is conceived, must not be understood as weakening the point cited in the text as actually decided, as the Chancellor *had* enjoined the judgment, which decree the Court of Appeals reversed, and the injunction could scarcely have proceeded on the ground alleged in the bill, that the trial came on unexpectedly to the covenantor, his counsel having assured him that it could not be reached on that day.

[1] Collingwood *v.* Irwin, 3 Watts, (Pa.) 310, *supra*, p. 158, n. 1 ; Paul *v.* Witman, 3 Watts & Serg. (Pa.) 407. "If no such notice," said Williams, C. J., in Pitkin *v.* Leavitt, 13 Verm. 384, "be given of the pendency of the action of ejectment, the recovery may be evidence of an eviction, but according to the decision in Williams *v.* Wetherbee, 2 Aik. (Verm.) 329, it must be accompanied with other evidence that it was not on the strength of an older and better title. Possibly it would have been better in that case to have considered the record as *prima facie* evidence of all the material allegations, turning the burden of proof on the party who was bound to make a good title, and who was supposed to know what title he had when he gave the deed." And such indeed was the decision in the recent cases of Simpson *v.* Belwin, 37 Tex. 675, and Taylor *v.* Stewart, 54 Ga. 81.

[2] It is presumed that the record would or would not be evidence of *eviction*, according as there did or did not appear upon its face evidence of the execution of a writ of possession, as in Fields *v.* Hunter, 8 Mo. 128 ; Sisk *v.* Woodruff, 15 Ill. 15 ; unless, indeed, the record of the judgment would, according to local decision, be itself deemed sufficient evidence, in most

yet that is not even *prima facie* evidence that such eviction was *under title paramount*, as against one who has been neither a party nor a privy to the proceeding.[1]

cases, of an eviction, as seems to have been thought in Kentucky, in Booker *v.* Bell, 3 Bibb, 175 ; Hanson *v.* Buckner, 4 Dana, 254; (Davis *v.* Logan, 5 B. Mon. 341, was in equity, and there was a general adjustment of title and damages ;) and in Rhode *v.* Green, 26 Ind. 83. But such a course of decision has been frequently denied by cases which hold that a judgment itself, unaccompanied by evidence of an actual or constructive change of possession, is no evidence of an eviction. McDowell *v.* Hunter, Dud. (Ga.) 4 ; Webb *v.* Alexander, 7 Wend. (N. Y.) 286 ; Paul *v.* Witman, 3 Watts & Serg. (Pa.) 407 ; Feriss *v.* Harshea, Mart. & Yerg. (Tenn.) 55 ; Hoy *v.* Taliaferro, 8 Sm. & Marsh. (Miss.) 741 ; Dennis *v.* Heath, 11 id. 218 ; Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 582.

[1] Graham *v.* Tankersley, 15 Ala. 645 (see also King *v.* Norman, 4 Com. Bench, 883 ; note to U. States *v.* Howell, 2 Amer. Lead. Cases, 419) ; Sisk *v.* Woodruff, 15 Ill. 15 ; Rhode *v.* Green, 26 Ind. 83 ; Walton *v.* Carr, 67 Ind. 164 ; Clements *v.* Collins, 59 Ga. 124 ; Booker *v.* Bell, 3 Bibb, (Ky.) 175 ; Prewit *v.* Kenton, id. 232 ; Devour *v.* Johnson, id. 410 ; Cox *v.* Strode, 4 id. 4 ; Hanson *v.* Buckner, 4 Dana, (Ky.) 254 ; Ryerson *v.* Chapman, 66 Me. 557 ; Fields *v.* Hunter, 8 Mo. 128 ; Wilder *v.* Ireland, 8 Jones L. (N. C.) 87 ; Stevens *v.* Jack, 3 Yerg. (Tenn.) 403. In Somerville *v.* Hamilton, 4 Wheat. (S. C. U. S.) 230, the question was left undecided, the court being divided in opinion. In Sisk *v.* Woodruff, *supra*, the point was carefully considered. "On whom," said Treat, C. J., who delivered the opinion, "does the law cast the burden of proof, where the warrantor had no notice of the pendency of the action of ejectment? Some courts hold that the record furnishes *prima facie* evidence of an eviction under valid title, and thereby compel the warrantor to prove affirmatively that he has not broken his covenant. . . . Other courts require the plaintiff to prove by evidence *dehors* the record that the judgment was founded upon an adverse and superior title. . . . The weight of authority in this country seems to favor this conclusion. We regard it as much the best rule. It is a familiar principle of law, that a man shall not be bound by a judgment pronounced in a proceeding to which he is not a party, actually or constructively. He should be allowed to appear in the case, and adduce evidence in support of his rights, before he is concluded by the judgment. If a warrantor has no notice of the action against his grantee, and no opportunity of showing therein that he transferred a good title, he cannot in any sense be considered a party to the action, and therefore ought not to be bound by any adjudication of the question of title. But if he has notice, he may become a party to the suit, and it is his own fault if his title is not fully presented and investigated. He then has an opportunity of sustaining the title he has warranted, and defeating a recovery by the plaintiff in ejectment. If he fails to do this successfully, he is concluded from afterward asserting the superiority of that title, and compelled to refund the purchase money, with interest. By giving the warrantor notice, the defendant in ejectment may relieve himself from the burden of afterward proving the validity of the title under which he is evicted. But if he neglects to give the notice, he must come prepared to prove on the trial of the action of covenant that he was evicted by force of an adverse and superior title ; in other words, he must show that the warrantor, by appearing and defending the action of ejectment, could not have prevented a recovery. This rule imposes no hardship upon a party. The giving of notice subjects him to but little inconvenience. It by no means follows that a judgment in ejectment against a grantee is founded upon the invalidity of the title derived from the grantor. It may be obtained by collusion, by a failure of the

§ 124. But however prudent it may be for a purchaser, when sued under an adverse title, to give notice to the party bound by the covenant and require him to defend the suit, it is not *necessary* to his recovery in the action on the covenant that such notice be given.[1] This was otherwise at the common law in case of warranty. Although it was not every real action in which voucher was admissible,[2] yet if a warrantee were impleaded in any action in which it was admissible, it became his duty to vouch his grantor to warranty; "and if he will not vouch him, he shall not afterwards have a writ of *warrantia chartæ*."[3] And although under the modern covenants notice seems not necessary to be given, yet its advantage is simply to enable the covenantee

defendant to make proof of the title under which he entered, or upon a conveyance from him, or under a tax title originating in his own default. There is no good reason for requiring a warrantor to show in the first instance that his covenant has not been broken. In this case Sisk had no notice of the pendency of the action of ejectment; and the record of the proceedings had therein was only evidence of the eviction of Woodruff. It was incumbent on the latter to prove in addition that the eviction was under title paramount."

[1] King *v.* Kerr, 5 Ohio, 158; Rhode *v.* Green, 26 Ind. 83; Duffield *v.* Scott, 3 Term, 376; Smith *v.* Compton, 3 Barn. & Ad. 408; Claycomb *v.* Munger, 51 Ill. 378. Sugden says positively, "A purchaser is not bound to give notice of an adverse suit to the covenantor." Sugd. on Vend. (14th ed.) p. 612. So by the Scotch law, "Regularly, the disponee, when the eviction is threatened, ought to intimate his distress to the disponer, that he may defend the right granted by himself; but though such intimation should not be made, the disponee does not lose his right of recourse, unless it should appear that in the process of eviction he has omitted a relevant defence, or subjected himself to an incompetent means of proof." 1 Erskine's Institutes, 132.

[2] *Supra*, § 11.

[3] Fitz. Nat. Brev. 134; Co. Litt. 101 *b*; Y. B. 8 Edw. IV. 11, per Markham, C. J. So by the Spanish law, a vendor if not "cited to warranty" is not liable at all, and the vendee loses all recourse to him. By the former Code of Louisiana, "the purchaser threatened with eviction who wishes to preserve his right of warranty against the vendor should notify the latter, in time, of the interference which he has experienced. This notification is usually given by calling in the vendor to defend the action which has been instituted against the purchaser. In the absence of this notification, or if it has not been made in due time, that is, in time for the vendor to defend himself, the warranty is lost; provided, however, that the vendor shall show that he possessed proofs which would have occasioned the rejection of the demand, and which have not been employed because he was not summoned in time." Art. 2493, 2494. By the revised Code of Practice of 1875, "The defendant, though he has not called his warrantor to defend the suit brought against him, does not lose on that account his action in warranty, unless the warrantor proves that he had means for defeating the action, which were not used owing to the defendant having failed to call him in warranty or having neglected to apprise him of the suit having been brought." Art. 388. The provisions as to "Demands in Warranty" are scarcely less minute and complex than those under the old common law. Art. 380 to 388; amended as to Art. 385, in Rev. St. of 1876, § 3911.

to recover on less testimony, since he is then not obliged to show under what title the recovery was had, except that it was not a title derived from himself since his purchase.

§ 125. In reviewing then what has been said on the subject of notice to the covenantor of the adverse proceedings, the following points appear to be settled by the weight of authority: —

First. The notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit.

Secondly. If such notice appear upon the record of that suit or if the covenantor be made a party to it, the court will, in the action on the covenant, be authorized to instruct the jury that the recovery is conclusive upon and binds the defendant in that action.

Thirdly. If the notice do not thus appear on the record, the question of conclusiveness of the judgment will depend upon the belief of the jury as to the reception of the notice.

Fourthly. If the record of the adverse suit does not exhibit on its face the title under which the recovery was had, the plaintiff in the action on the covenant must, notwithstanding proper notice has been given, prove that such title did not accrue subsequently to the deed to himself.

Fifthly. If no notice has been given, the record of such adverse suit is not even *prima facie* evidence that the title was a paramount one, though it may under some circumstances be evidence of eviction; and,

Sixthly. It is not indispensable to the recovery on the covenant that notice of the adverse suit shall have been in any way given.[1]

[1] Judge James O. Pierce, in an article entitled "A Study in the Law pertaining to Covenants of Warranty," 6 Southern Law Review, 719, discusses the question whether notice given to a remote warrantor by his immediate vendee of the pendency of a suit in which a paramount title is asserted, operates to the benefit of the vendee in possession. He concludes that it does not, and that the right to claim the benefit of the notice is personal to him who gives it. For this position, however, no direct authorities are cited. The reasons given in support of it are, briefly: first, the right to give such a notice arises only when a suit is brought; secondly, the notice takes the place of the ancient *summoneas ad warrantizandum*, which was process to bring the warrantor into court to defend his title, and it would be contrary to all analogies to give to the adjudication any effect except as between the parties; thirdly, the notice when given does not confer a new right of action, but merely furnishes the covenantee with a new means of evidence for a future action;

The effect of notice to the covenantor as to his liability for costs and expenses incurred by the covenantee, in defending against the paramount title will be considered in a subsequent chapter.[1]

§ 126. The form of the covenant of warranty as used in America from the earliest settlement of the colonies to the present day has already been given.[2] Like all the other covenants for title, it is either general, that is, extending to the claims of all persons whomsoever, or limited, that is, restricted to the acts of the grantor and those claiming under him.[3]

But even when the covenant is general, when it purports to assure the purchaser from disturbance on the part of the grantor *or any person or persons whomsoever*, yet the generality of this assurance is subject to certain well-settled qualifications. And although in all the English and in many of the American cases upon this subject the covenant was that for quiet enjoyment and not the covenant for warranty, yet with the exceptions to be presently mentioned the line of decision is the same with respect to both.

§ 127. And first, it is well settled that such a covenant is not broken by tortious disturbances. It is true that in a few old cases it seems to have been thought that a covenant thus framed extended to all interruptions and disturbances whatsoever, whether lawful or tortious;[4] and although still older authorities were directly in opposition to such a doctrine,[5] the law seems not to have been settled until the case of Hayes *v.* Bickerstaff.[6] There, the defendant, being possessed of a long term of years in certain woodlands, leased them to the plaintiff for a portion of the term, with a covenant that the latter should quietly enjoy

and fourthly, the evidence so created operates by way of estoppel, applies only to parties and privies, and as estoppels must be mutual has no effect whatever except between the warrantor and the covenantee who gives the notice.

[1] Ch. IX.

[2] *Supra*, p. 29.

[3] *Supra*, p. 35 *et seq.*

[4] See Mountford *v.* Catesby, 3 Dyer, 328, and cases there referred to.

[5] Brooke's Ab. Garranties, pl. 1. "If one lease for years and covenant to warrant the land, and the lessee be ousted by wrong, he shall not have covenant; otherwise if it be by elder title," citing Y. B. 26 Hen. VIII. 3, a miscitation for 26 Hen. VIII. 11. So in Y. B. 22 Hen. VI. (Pasch.) 26, "If a lease be made for a term of years by deed, so that the lessor is chargeable by writ of covenant, if a stranger who has no right oust the termor, yet he shall not have a writ of covenant against his lessor. But if he to whom the right belongs oust the termor, then he shall have writ of covenant against his lessor."

[6] Vaughan, 118; s. c. but not s. p., 2 Mod. 34.

the same "without any impediment, disturbance, eviction, or interruption whatsoever from either the defendant, his executors, administrators, or assigns, or any other person." The defendant subsequently granted his reversion in the term, and the grantee, notwithstanding the plaintiff's attornment to him, entered upon the lands and deprived the latter of his possession. The plaintiff then brought this action on the above covenant; but it was decided that the covenant, however generally expressed, must be understood as applying merely to the acts of those *claiming by title;* because, first, the grantor does not expressly covenant against *tortious* acts of strangers; secondly, it would be unreasonable that he should do so, as he could neither foresee nor prevent them; thirdly, the law gives the covenantee a remedy against the wrong-doer; fourthly, the covenantee might thus have a double remedy and satisfaction, one against his covenantor and the other against the wrong-doer; fifthly, it would enable him to injure the covenantor by colluding with a stranger to make a tortious disturbance; and sixthly, because the express words of the covenant were that the covenantee should *lawfully* enjoy the premises without the let or hindrance of the covenantor or any other person.

These unanswerable reasons have since been consistently acquiesced in, and the case has long been recognized on both sides of the Atlantic as decisive authority.[1]

[1] Tisdale *v.* Essex, Hobart, 34; Wotten *v.* Hele, 2 Saund. 178, *n.*; Nokes *v.* James, Cro. Eliz. 675; Lewis *v.* Smith, 9 Man. Gr. & S. 610; Hoppes *v.* Cheek, 21 Ark. 585; Playter *v.* Cunningham, 21 Cal. 232; Branger *v.* Manciet, 30 id. 624; Davis *v.* Smith, 5 Ga. 274; Beebe *v.* Swartwout, 3 Gilm. (Ill.) 180 (see a very elaborate argument of counsel and opinion in that case as to the nature of the covenant for quiet enjoyment generally); Avery *v.* Dougherty, 102 Ind. 443; Bartlett *v.* Farrington, 120 Mass. 284; Kimball *v.* Grand Lodge, 131 id. 59; Surget *v.* Arighi, 11 Sm. & Marsh. (Miss.) 96; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1; Folliard *v.* Wallace, id. 402; Kelly *v.* Dutch Church, 2 Hill, (N. Y.) 111; Gardner *v.* Keteltas, 3 id. 330; Meeks *v.* Bowerman, 1 Daly, (N. Y.) 100; Butterworth *v.* Volkening, 4 Thom. & Cook, (N. Y. S. C.) 650; Johnson *v.* Oppenheimer, 34 N. Y. Sup. Ct. 416; Coddington *v.* Dunham, 35 id. 412; Wilder *v.* Ireland, 8 Jones L. (N. C.) 38; Green *v.* Watson, 2 Ont. 627 (a case of a patent right); Brick *v.* Coster, 4 Watts & Serg. (Pa.) 499; Spear *v.* Allison, 20 Pa. 200; Schuylkill R. R. *v.* Schmoele, 57 id. 273; Moore *v.* Weber, 71 id. 327; Rantin *v.* Robertson, 2 Strob. (S. C.) 366; Noonan *v.* Lee, 2 Black, (S. C. U. S.) 507; Gleason *v.* Smith, 41 Verm. 293; Underwood *v.* Birchard, 47 id. 305; Yancey *v.* Lewis, 4 Hen. & Munf. (Va.) 395; McInnis *v.* Lyman, 61 Wis. 191. In Meeks *v.* Bowerman, *supra*, the tenant alleged that the covenant for quiet enjoyment had been broken by reason of the house demised having previously, with the landlord's assent, been used as a brothel, and that he and his family had been so annoyed by lewd persons calling there that they could not peaceably enjoy the premises and had

§ 128. The qualification, however, limiting the disturbances to those made under color of title as distinguished from tortious interruptions, has three equally well settled exceptions: —

1. The covenant extends to all acts of the covenantor himself, whether tortious or otherwise.[1] And it is obvious that the acts of the servants or agents of the covenantor are, if committed at his command, as much within the scope of the covenant as if they were his own acts.[2]

It is said, however, that even the acts of the covenantor himself must be done under *assumption* of right as distinguished from mere trespasses.[3] Thus it seems to have been thought that if a

therefore been evicted therefrom, but it was held that this was no breach. "The acts of strangers not claiming under any title cannot in any sense be regarded as a breach of this covenant on the part of the landlord." So where a lessee finds the premises in possession of a former tenant whose term has expired, it is held that the covenant does not extend to compel the landlord to give possession; the wrongful holding over of the former tenant is no breach. Gardner *v.* Keteltas, *supra;* Howard *v.* Doolittle, 3 Duer, (N. Y.) 464. And the law (as to tortious disturbances) applies equally whether the covenant is express or implied. Gardner *v.* Keteltas, *supra;* Gazzolo *v.* Chambers, 73 Ill. 75.

[1] Cave *v.* Brookesby, W. Jones, 360; Andrews' case, Cro. Eliz. 214; Corus *v.* ——, id. 544; Crosse *v.* Young, 2 Show. 425; Lloyd *v.* Tomkies, 1 Term, 671; Wotten *v.* Hele, 2 Saund. 180, *n.*; Seaman & Browning's case, 1 Leon. 157; Levitzky *v.* Canning, 33 Cal. 308; O'Keefe *v.* Kennedy, 3 Cush. (Mass.) 325; Sedgwick *v.* Hollenbeck, 7 Johns. (N. Y.) 376; Mayor of New York *v.* Mabie, 3 Kern. (N. Y.) 156. (In Crosse *v.* Young, Shower reports a long argument of his own on this point, "which I had prepared to urge, but was prevented by a ready judgment for the plaintiff by the whole court.") Thus in Seaman & Browning's case, *supra*, one Marshal sold land to the plaintiff with a covenant for quiet enjoyment; the breach assigned was that Marshal entered and cut certain elm trees, and this was held to be a breach of the covenant.

[2] Seaman & Browning's case, *supra*. In a case in Mississippi, Surget *v.* Arighi, 11 Sm. & Marsh. 96, the breach laid in an action on a covenant for quiet enjoyment brought by a lessee against his lessor was the destruction of the premises and expulsion of the tenant by a mob, "moved by exasperation and excitement by them entertained towards the defendant." It was urged for the plaintiff that this was equivalent to an eviction by the lessor himself; but the court held that "it was not sufficient that the mob were *induced* to do the act, but that the lessor must *do* the act or excite others to do it, not indirectly but directly. He must be the agent who acts with a view to that particular result. This was the necessary consequence of the principles stated in the authorities in regard to covenants for quiet enjoyment. The language employed in the covenant in Dudley *v.* Folliott, 3 Term, 584, was even broader than in the present case; and yet it was held only to be a covenant for quiet enjoyment. It was not sufficient that the mob were actuated by feelings of malice or revenge against the defendant." And unless, therefore, it should appear that the acts of the mob were constructively those of the lessor himself, the case would fall within the rule that the covenant did not extend to the tortious acts of others. Jones *v.* Worley, 21 La. An. 404.

[3] Crosse *v.* Young, 2 Show. 425; Lloyd *v.* Tomkies, 1 Term, 671; Wotten *v.* Hele, 2 Saund. 180, *n.*; O'Keefe *v.* Kennedy, 3 Cush. (Mass.) 325; Sedgwick *v.* Hollenbeck, 7 Johns. (N. Y.) 376; Levy *v.* Bend, 1 E. D. Sm. (N. Y.) 169.

landlord should enter upon the demised premises for the purpose of sporting,[1] the tenant could not maintain covenant for such an act, and in New York this was expressly decided where the landlord entered for the purpose of making repairs.[2] But where one sold a house with a covenant that the purchaser should enjoy it without the lawful let of the grantor, and the latter locked up a pew appertaining to the house, it was held that this was as strong an assertion of right as could well be imagined.[3] So where in New York, the corporation had leased a certain wharf, it was held that the entry upon the premises by the agents of the corporation and the assumption by them of the control of the berths and locations which ships were to occupy thereat was a breach of the implied covenant for quiet enjoyment in the lease — that if the character of the act were such as reasonably to show that the corporation acted *under an assumption of title*, the action could be sustained,[4] and the law has since been elsewhere held the same way.[5]

[1] Per Ashhurst, J., in Lloyd *v.* Tomkies, 1 Term, 671, and per Lord Ellenborough in Seddon *v.* Senate, 13 East, 72.

[2] Doupe *v.* Genin, 1 Sweeny, (N. Y.) 30.

[3] Lloyd *v.* Tomkies, *supra*.

[4] Mayor of New York *v.* Mabie, 3 Kern. 151. The question whether the acts complained of as a disturbance of the rights of the lessee were done in the lawful exercise of a power to regulate the disposition of vessels in the public docks under any ordinances upon the subject did not arise upon the evidence in this case and was expressly reserved. "It was not intended in that case," it was afterwards said in Doupe *v.* Genin, *supra*, "to extend the force of the covenant beyond a protection to the lessee against the unlawful entry of the lessor himself, and it is clearly intimated that the entry must be under an assumption or claim of title to the premises. Otherwise it would be a mere trespass and not a breach of the covenant." The law upon this point is thus stated by Platt: "In a case in Rolle's Abridgment (Davie *v.* Sacheverell, p. 429, pl. 7), it is laid down that a covenant by J. S. that his lessee shall enjoy the lands peaceably and quietly, without any *lawful* let, disturbance, ejectment, or molestation of the said J. S., is not broken by his entry on the lessee as a mere trespasser and without any lawful title. Subsequent decisions, however, have taken a distinction between a tortious entry by a stranger and by the covenantor himself; and it is now admitted law that although the covenant only stipulates for quiet enjoyment without the lawful interruption of the covenantor, his heirs or assigns, yet he cannot avail himself of the subterfuge that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong; for, as against the party himself, the court will not consider the word *lawful*, nor drive the covenantee to an action of trespass, when by the general implied covenant in law the vendor had engaged not to annul his own deed, either by a rightful or an illegal entry." Platt on Covenants, 318.

[5] Sherman *v.* Williams, 113 Mass. 481. In the very recent case of Avery *v.* Dougherty, 102 Ind. 443, the distinction was clearly stated that a mere fugitive trespass by the landlord will not constitute a breach of the implied covenant for quiet enjoyment, but that an entry by him under claim or assertion of right would be a breach.

In Curtis *v.* Deering, 12 Me. 499, land had been conveyed in mortgage, with covenants for seisin and of warranty to the

2. If the covenant be expressly against the acts of *a particularly named person*, it will not be restrained to his *lawful* acts,

mortgagee, who neglected to record the mortgage until after the same premises had been conveyed in fee by the mortgagor to a purchaser without notice, who by recording his deed took the title clear of the mortgage. In an action on the covenant of warranty brought against the mortgagor, it was urged that the covenant extended only to elder and better titles — to those then existing and not to those subsequently acquired. And such is undoubtedly the law; for in Grenclife *v.* W——, Dyer, 42 *b*, "All the judges agreed that when a man bound himself and his heirs to warranty, they are not bound to warrant new titles of action accruing through the feoffee or any other after the warranty made, but only such titles as are *in esse* at the time of the warranty made." But the court held that a general covenant against all claims had been limited by construction of law to lawful claims, because the law was a sufficient protection against wrong-doers, but all lawful claims except such as were derived from the plaintiff were within the terms and should be within the operation of the covenant; and that there was no propriety in applying the rule which requires proof of elder title to evictions founded upon the subsequent irresistible acts of the covenantor. And in answer to the obvious objection that the defendant, being the owner of the equity of redemption and therefore having title to the land, had a right to convey, and in so doing had not broken his covenant, it was held that as against the mortgagee a conveyance in fee, without any saving being made by his tenant at will, was a disseisin at the election of the former, and that his conveyance, against the mortgagee, was an unlawful act.

Such a decision must, it is presumed, be supported by the peculiar effect given in that State to the subsequent conveyance, for the result was to make the defendant liable for the plaintiff's neglect to record his mortgage. Apart from some local law, nothing is more common than a conveyance of what, technically called an equity of redemption, is at this day practically the legal estate, and if such a conveyance is made in good faith, to a purchaser without notice of the mortgage, and who takes clear of it because it has not been recorded, there would seem no principle on which a liability *under the covenants for title* could rest.

This decision was, however, cited in Maeder *v.* City of Carondelet, 26 Mo. 114, where the facts were somewhat similar, but there was an express provision in the lease that nothing therein contained should be construed to imply a covenant for quiet enjoyment, and the court seem to have considered that had it not been for this provision the case would have been governed by Curtis *v.* Deering. In Lukens *v.* Nicholson, 4 Philadelphia R. 22, it was held that the assignee of a rent reserved on a conveyance in fee, whose estate is defeated by his own failure to put the deed of assignment on record and the subsequent execution of a mortgage by the assignor, could recover damages from the latter in an action on a covenant of special warranty, and the case of Curtis *v.* Deering was approved. See the opinion of the court, *infra*, Ch. VIII.

In the case in Ohio of Wade *v.* Comstock, 11 Ohio, 71, the facts were the same as in Curtis *v.* Deering, except that the defendant had conveyed a tract of land in fee with a covenant of warranty to purchasers who had neglected to record their deed; the land was afterwards levied upon and sold as his property to a purchaser, who, recording his deed, took a valid title, and to whom the defendant subsequently executed a release. Upon these facts it was elaborately urged that the defendant was liable on his covenant of warranty, but the court held that although the defendant might doubtless be liable in some form of action, the remedy was not to be sought in an action on the covenant, and the decision in Curtis *v.* Deering, on which the plaintiff had strongly relied, was considered to be not only unsupported by authority but directly contrary to it. The court referred also to a distinction noticed in several of the cases between such acts of the covenantor as were within the express words of a covenant for quiet enjoy-

since the covenantor is presumed to know the party against whose acts he covenants, and may therefore be reasonably expected to stipulate against all of them.[1]

3. Where the plain intention of the covenant, manifested by express words, is to protect the covenantee against claims of every description, as where it is against all claiming or *pretending* to claim.[2]

ment, and those which come within the general scope of a covenant of warranty, as to which see *infra*, § 131. And in a recent case in Pennsylvania (Scott *v.* Scott, 70 Pa. 244, Sharswood, J.), it was said, "No authority has been or can be cited to support the position that a deed or will subsequently made by a grantor is itself a breach of the covenant of warranty contained in his [prior] conveyance, more especially when such deed or will is a lawful act."

An old case may be here noticed which at first sight seems to support the decision in Curtis *v.* Deering. In Sir Perall Brocas' case, cited Touchstone, 170, and unreported elsewhere (see *infra*, Ch. X.), it is said, "If I bargain and sell land, by deed indented, to B., and before the deed is enrolled I grant the same land to C., and covenant that I am seised of a good estate of it in fee, and, after, the deed is enrolled; in this case the covenant is broken;" but it will be noted that the deed enrolled (under the statute of Enrolments, 27 Hen. VIII. c. 16, see 2 Black. Com. 338) was the deed to B., whose enrolment (within the six months required by the act) caused the breach of the covenant contained in the deed to C., which is the only covenant referred to in the case.

[1] Thus, in the old case of Foster *v.* Mapes, Cro. Eliz. 212, the defendant covenanted to save the plaintiffs harmless from one Blount, and the plaintiffs, in an action on this covenant, averred as a breach that "B. had entered upon the premises and put them out." The breach was held to be well assigned, "for," said the court, "when the covenant is to save them harmless against a person certain, he ought to defend him against the entry of that person, be it by *droit* or *tort*, for he is damnified if he be disturbed though by wrong."

In Nash *v.* Palmer, 5 Maule & Selw. 374, Lord Ellenborough said: "The rule has been correctly stated at the bar that where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant if it were good against all the acts which the folly or malice of strangers might suggest, and therefore the law has properly restrained it within its reasonable import, that is to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore reasonably be expected to stipulate against any disturbance from him, whether from lawful title or otherwise." And where, in a covenant for quiet enjoyment, an exception as to the acts of certain specified persons is introduced, the covenant will apply to the acts of all others not included in the exception; as in Woodroff *v.* Greenwood, Cro. Eliz. 517, where a tenant in tail, with reversion to the Queen in fee, leased for twenty-one years, covenanting that the lessee should enjoy it against all persons without the interruption of any besides the Queen, her heirs and successors, *existentibus regibus vel reginis Angliæ*, and the Queen granted the reversion to another, who upon the death of the tenant in tail without issue evicted the lessee, who brought covenant and obtained judgment, "for none are excepted besides the Queen and her successors, and not her patentee." Perry *v.* Edwards, 1 Strange, 400; Fowle *v.* Welsh, 1 Barn. & Cress. 29; Patton *v.* Kennedy, 1 A. K. Marsh. (Ky.) 389; Pence *v.* Duval, 9 B. Mon. (Ky.) 49.

[2] Chaplain *v.* Southgate, 10 Mod. 383. The defendant having leased a farm to the

§ 129. Secondly. Nor will a covenant against disturbances "by any persons whomsoever," extend to acts of sovereignty.

1. It will not extend to the exercise by the State of its right of eminent domain.

Thus where in an early case in Massachusetts, a lease had been made with a covenant for quiet enjoyment, upon which the lessee, being evicted by the municipal corporation who opened a street through the demised premises, brought covenant, it was held that the action could not be maintained, as this was not such an interruption as should properly come within the scope of the covenant.[1] And the same decision was afterwards made, with more elaboration, in a case in Pennsylvania;[2] and the law may be considered as so settled there and elsewhere.[3]

2. Nor to any other lawful acts of sovereignty. This has been shown in a somewhat recent curious class of cases in the United States, arising from the liberation of slaves under the Emancipation Proclamation of 1863, the first of which was presented in Missouri, where one having sold a slave with a covenant that she was a slave for life, it was held that the covenant was not broken by the emancipation,[4] and decisions to the same effect have been

plaintiff and covenanted that he should quietly enjoy the closes therein contained against all claiming or pretending to claim any right in them, the breach assigned was "that one having or pretending to have a claim time out of mind did enter upon the said closes," which was held by the court to be sufficient, as "the words of the covenant did extend to all interruptions whatsoever, and so was the plain intent and meaning of the parties; for if it was to extend to legal claims only then would the tenant be put under the hardship of trying the right for the landlord; which was the very thing the tenant plainly designed to prevent by this covenant."

[1] Ellis *v.* Welch, 6 Mass. 246.

[2] Frost *v.* Earnest, 4 Whart. (Pa.) 86.

[3] Stevenson *v.* Loehr, 57 Ill. 509; Kuhn *v.* Freeman, 15 Kans. 426; Brimmer *v.* City of Boston, 102 Mass. 19; Boston Co. *v.* Munson, 117 id. 34; Cooper *v.* Bloodgood, 32 N. J. Eq. 209 (and see the reporter's note to that case); Folts *v.* Huntley, 7 Wend. (N. Y.) 210; Dobbins *v.* Brown, 12 Pa. 75; Bailey *v.* Miltenberger, 31 id. 37; Schuylkill R. R. Co. *v.* Schmoele, 57 id. 273; Dyer *v.* Wightman, 66 id. 427; Legal Tender Cases, 12 Wall. (S. C. U. S.) 549.

[4] Phillips *v.* Evans, 38 Mo. 305. "When the vendor sold his slave," said Wagner, J., who delivered the opinion, "with a covenant that she was a slave for life, he intended nothing more than that the law at that time made her a slave for life. The covenant extended to all defects in the title and was intended to protect the purchaser against them. But it cannot be presumed that the sovereign act or authority of the government, by which all title or property in slaves was totally annihilated, was in the contemplation of the parties. The emancipation of the slaves by the sovereign act of the people was neither anticipated nor thought of when the slave was sold in this case. It was not in the minds of the parties nor embraced within the purview of the warranty. In case of the sale and conveyance of real estate, when the vendor warrants the title

made in all the Southern States in which the question has been presented,[1] and the Supreme Court of the United States has recognized and affirmed their correctness.[2]

3. And where the loss is consequent upon the exercise of the act of a sovereign *de facto*, it will be considered as not coming within the scope of the covenant for one of two reasons: either it is the lawful act of the sovereign, and therefore comes within the exception just noticed, or it is a mere tortious act, and therefore comes within the general principle.[3]

and covenants for peaceful and quiet enjoyment, should the property be swallowed up and destroyed by an earthquake, it will not be contended that destruction would work a breach of the covenant rendering the seller responsible. We are unable to distinguish the case supposed from the one presented here at bar. The ordinance of emancipation caused a complete annihilation or destruction of all property in slaves. It could not be controlled by the parties nor was it contemplated by them; and clearly the covenant to warrant and defend the title to the negro, and that she was a slave for life, cannot, by any just construction, be made to apply to such an occurrence."

[1] Fitzpatrick *v.* Hearne, 44 Ala. 171; Haskill *v.* Sevier, 25 Ark. 152; Willis *v.* Haliburton, id. 173; Walker *v.* Gatlin, 12 Fla. 9; Hand *v.* Armstrong, 34 Ga. 232; Bass *v.* Ware, id. 386; Porter *v.* Ralston, 6 Bush, (Ky.) 665; Whitworth *v.* Carter, 43 Miss. 61; Mayfield *v.* Barnard, id. 270. The case of Steele *v.* Richardson, 24 Ark. 365, was decided upon a different ground.

[2] Osborn *v.* Nicholson, 13 Wall. (S. C. U. S.) 655. "Emancipation and eminent domain," said Mr. Justice Swayne, who delivered the opinion of the court, "work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim. . . . All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the national Constitution which forbids a State to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself."

[3] Thus in Dudley *v.* Folliott, 3 Term, 584, land had been conveyed by the defendant to the grantor of the plaintiff with covenants for seisin and of quiet enjoyment "against all and every person or persons whomsoever," and the plaintiff assigned as a breach that at the time of the conveyance by the defendant the land had been confiscated during the Revolution by the State of New York. The plaintiff argued, first, that the defendant had no title to the premises, they having been lawfully confiscated by the State, whose independence as a part of the Union had subsequently been recognized; and secondly, that (under the authority of Mountford *v.* Catesby, *supra*, p. 165, n. 4) the covenant extended not only to acts done by persons having or claiming title, but to an eviction even by a wrongdoer; but the court "having no doubt about the law as it respected the first question, and thinking it would lead to the discussion of improper topics, would not permit it to be argued. And as to the second question they thought it equally clear; for even a general warranty, which is conceived in terms more general than the present covenant, has been restrained to *lawful* interruptions," and judgment was given for the defendant. So in Watkins *v.* De Lancey, 4 Doug. 354, where one in England sold certain real estate in New York, which he had inherited from his father, who was attainted and his property

§ 130. Thirdly. At one time there seems to have been some doubt whether a disturbance or interruption interfering with the title and possession of the land by reason of a suit in equity came within the scope of a covenant for quiet enjoyment against disturbances generally.[1] This question is now well settled in the affirmative;[2] but where the proceeding in equity interferes only with a particular mode of enjoyment of the land, or part of it, but not with the title or possession, it is not a breach.[3]

§ 131. Nothing is more generally or more truly said than that "An eviction is necessary to a breach of the covenants for quiet enjoyment and of warranty." The exceptions are either where the former covenant is so expressed as to have a wider scope than the latter,[4] or where some peculiar local construction is given to these covenants, or one of them.[5] The question what is eviction will of course be considered irrespective of these exceptions.

confiscated, Lord Mansfield held: "The defendant covenants that he is seised in fee of the lands in question by all the laws in being, but he does not covenant against a rebellion or a revolution by an armed force. There is no color for it."

[1] Selby *v.* Chute, 1 Brownl. 23; see, however, the remark made in Hunt *v.* Danvers, T. Raym. 371, as to the report of this case; and in Winch's Entries, 118, will be found a declaration in which a disturbance by a chancery suit is assigned for breach, and Winch was himself one of the judges at the time when Selby *v.* Chute was decided.

[2] Calthorp *v.* Heyton, 2 Mod. 54; Hunt *v.* Danvers, T. Raym. 370; Trust Co. *v.* Covert, 30 U. Can. Q. B. 239; s. c. 39 id. 327.

[3] Morgan *v.* Hunt, 2 Vent. 213; Dennett *v.* Atherton, L. R. 7 Q. B. 326. Sugden had remarked in a previous edition of his treatise, "It is customary to expressly extend covenants for title to equitable charges, disturbances," &c.; and with like caution Mr. Preston had said that it was usual to insert the words "without any lawful let," &c.; Shep. Touch. 166, Preston's ed.; so as to preclude the possibility of question as to the extent of the covenant. The law is now so well settled as to both these points that in modern conveyancing these precautions are not observed, and Sugden in his last edition says, "And a suit in equity by which a purchaser is disturbed is within a covenant for quiet enjoyment against disturbances generally." Vend. (14th ed.) 601.

[4] As for example, where the covenant for quiet enjoyment stipulates against "any let, suit, interruption, disturbance," etc. Such a distinction was noticed by Gibson, C. J., in Stewart *v.* West, 14 Pa. 338. "A covenant for quiet enjoyment," said he, "which resembles the modern covenant of warranty, differs from it in this, that the former is broken by the very commencement of an action on the better title." So the erection of a gate in a lane through which the plaintiff had a right of way was held to be a breach of a covenant that the defendant would do nothing to molest, hinder, or prevent him in the quiet possession or enjoyment of the lands. Andrews *v.* Paradise, 8 Mod. 318. So of an interruption of a way of necessity through a house; Morris *v.* Edgington, 3 Taunt. 24; or of the building of a house on part of the premises; Kidder *v.* West, 3 Lev. 167.

[5] Such as seems still to prevail in South Carolina, as it formerly did in Ohio, with respect to the covenant of warranty. See *supra*, p. 147, n. 4.

§ 132. The original and technical meaning attached to the word certainly was an expulsion by the assertion of a title paramount and by process of law;[1] but it has been long since such an interpretation has been given to the term in England, for in a case in the King's Bench at the close of the last century, where a declaration on a covenant for quiet enjoyment was demurred to because it did not show an ouster "under any legal process of law," the report says that "this was abandoned, the precedents being against it."[2]

We were at first more conservative in America. In rather an early case in New York it was said that "the previous cases in that State, taken together, show that to constitute an eviction by a stranger there must be a disturbance of the possession under a paramount title by due process of law,"[3] and in a subsequent case in the same State a similar position was taken.[4] But the cases cited did not sustain the doctrine, and more recently decisions there, as well as elsewhere, have settled the law as it is in England, that legal process is not necessary to an eviction.[5]

[1] See the various dictionaries.

[2] Foster *v.* Pierson, 4 Term, 617. In Upton *v.* Townend, 17 Com. Bench, 30, the court, in speaking of the eviction of a tenant by the landlord, said: "It is extremely difficult at the present day to define with technical accuracy what is an eviction. Latterly, the word has been used to denote that which formerly it was not intended to express. In the language of pleading, the party evicted was said to be expelled, amoved, and put out. The word 'eviction,' from *evincere*, to evict, to dispossess by a judicial course, was formerly used to denote an expulsion by the assertion of a title paramount and by process of law. But that sort of eviction is not necessary to constitute a suspension of the rent, because it is now well settled that if the tenant loses the benefit of the enjoyment of any portion of the demised premises by the act of the landlord, the rent is thereby suspended. The term 'eviction' is now popularly applied to every class of expulsion or amotion. Getting rid thus of the old notion of eviction, I think it may now be taken to mean this: not a mere trespass and nothing more, but something of a grave and permanent character done by the landlord with an intention of depriving the tenant of the enjoyment of the demised premises. If that may in law amount to an eviction, the jury would very naturally cut the knot by finding whether or not the act done by the landlord is of that character and done with that intention."

[3] Lansing *v.* Van Alstyne, cited in a note to 2 Wend. 563. The date of the case is not given, but that in which it is cited was decided in 1829. The cases referred to were Greenby *v.* Wilcox, 2 Johns. (N. Y.) 1; Waldron *v.* McCarty, 3 id. 473; Kortz *v.* Carpenter, 5 id. 120; Vanderkarr *v.* Vanderkarr, 11 id. 122; and Kerr *v.* Shaw, 13 id. 236.

[4] Webb *v.* Alexander, 7 Wend. 285.

[5] Greenvault *v.* Davis, 4 Hill, (N. Y.) 645. "Upon principle," said Bronson, J., "I can see no reason for requiring an eviction by legal process. Whenever the grantee is ousted of the possession by one having a lawful title to the property, paramount to the title of the grantor, the covenants of warranty and for quiet enjoyment are broken, and the grantee may sue." So in Booth *v.* Starr, 5 Day, (Conn.) 282; Coble *v.* Wellborn, 2 Dev.

§ 133. It follows that any actual entry and dispossession, adversarily and lawfully made under paramount title, will be an eviction. Such an entry could at common law be made by the holder of the paramount title in cases of abatement, intrusion, or disseisin,[1] while it could not be made in cases of discontinuance or deforcement.[2] And whenever at the present day such a right is exercised,[3] it is considered to have all the force and effect of a dispossession under legal process.[4]

§ 134. Nor is it, in general, necessary that the purchaser should await his actual dispossession by the holder of the paramount title, but he may under certain circumstances surrender the possession to the latter, thereby creating an *ouster in pais*.[5]

Thus in the early and leading case in Massachusetts of Hamilton *v.* Cutts,[6] the defendant's testator conveyed certain land to the plaintiff, with a covenant of warranty against all lawful claims. To part of this land the testator had no title, and the real owner thereof entered into possession of the same with the consent of the plaintiff, who withdrew therefrom. "It was contended," said Parsons, C. J., who delivered the opinion, "that here there was no legal evidence of an ouster, because the dispossession took place

(N. C.) 390; Grist *v.* Hodges, 3 id. 200; Hagler *v.* Simpson, Busb. L. (N. C.) 386; Parker *v.* Dunn, 2 Jones L. (N. C.) 204; Leary *v.* Durham, 4 Ga. 593; Green *v.* Irving, 54 Miss. 450; Funk *v.* Creswell, 5 Clarke, (Io.) 86. In fact all the cases cited under the ensuing heads virtually overrule such a position. In Stewart *v.* Drake, 4 Halst. (N. J.) 141, the court said that "the cases cited in the argument from Johnson's Reports, as a whole, decide that there must be a disturbance in or deprivation or cessation of the possession, by the prosecution and operation of legal measures;" but the point decided in the case was that where land subject to a mortgage had been sold with a covenant against incumbrances, the mortgage foreclosed, and the property bought by the tenant of the vendee, these circumstances amounted to a legal eviction. See *infra*, § 143.

[1] And even in these cases the right of entry, which was never assignable at law, Co. Litt. 314 *a*, might be tolled or taken away by descent cast. Litt. §§ 385, 413. This has been altered by statute 3 & 4 Will. IV. c. 27, § 39.

[2] Where the original entry being lawful, and an apparent right of possession thereby gained, that right was not allowed to be defeated by the mere act or entry of the claimant. 3 Blacks. Com. 175.

[3] As for example, by a mortgagee, who in Massachusetts, Maine, Rhode Island, New Hampshire, and some other States has by statute a right of entry under certain circumstances.

[4] Gore *v.* Brazier, 3 Mass. 540; Sprague *v.* Baker, 17 id. 590; Smith *v.* Shepard, 15 Pick. (Mass.) 147; Rickert *v.* Snyder, 9 Wend. (N. Y.) 422.

[5] The earlier New York cases did not seem to recognize this. Thus in Kerr *v.* Shaw, 13 Johns. 238, *supra*, it was said, "The covenantee ought not to stop short of an actual ouster; if he means to rely upon his covenant, he has no right to make any compromise until an actual eviction has been shown." But the law has not since been held so strictly.

[6] 4 Mass. 350.

with the consent of the tenant in possession. It is true, that if the tenant consents to an *unlawful* ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful, and in that case the tenant may yield to a dispossession without losing his remedy on the covenant of warranty. . . . There is no necessity for him to involve himself in a lawsuit to defend himself against a title which he is satisfied must ultimately prevail;" and judgment was given for the plaintiff. The authority of this decision has been recognized by numerous others, and it has long been beyond question.[1]

[1] "The defendant had an undoubted right," it was said in Drew *v.* Towle, 10 Fost. (N. H.) 537, "upon being satisfied of the invalidity of his title, to abandon the possession of the premises, and thereby to avoid the necessity of litigation and its attendant perplexities and expenses. He owed the plaintiff no duty to remain in possession and sustain the burden of the defence when the title was invalid. . . . The right of the defendant was, at any period, to give up the possession to the rightful owner upon claim made. He was under no obligation, either of duty or contract, to withhold it. He was not bound to seek redress through a litigation that might turn out to be fruitless with the party having the title." So in Greenvault *v.* Davis, 4 Hill, (N. Y.) 643, the defendant conveyed to the grantor of the plaintiff, with a covenant of warranty, land which was subsequently sold under power of sale in a mortgage which existed at the time of the conveyance, and the purchaser put a tenant in possession, and this was held to be a sufficient eviction. The court said: "There is no reason why such surrender without the trouble and expense of a lawsuit should deprive him of a remedy upon the covenant. The grantor is not injured by such an amicable ouster; on the contrary, it is a benefit to him, for it thus saves the expense of an action against the grantor to recover the possession." And in Clarke *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 372, it was said by Gibson, J., "The law does not require the idle and expensive ceremony of being turned out by legal process where that result would be inevitable." Again, in Radcliff *v.* Ship, Hard. (Ky.) 292, it was said, "Had the plaintiff refused to yield that just respect and due obedience to the court which every good and well-disposed citizen ought to render, then it would have been necessary, in order to effectuate the justice of the case and to complete the right of the plaintiff in ejectment, to have executed the writs of possession; but surely there can be no objection to his acquiescing in and submitting to the judgment, thereby rendering compulsion unnecessary, and preventing the further accumulation of costs."

To the same effect are Sterling *v.* Peet, 14 Conn. 254; McDowell *v.* Hunter, Dudley, (Ga.) 4; Leary *v.* Durham, 4 Ga. 606. And the surrender must obviously be made to the lawful owner, and not to the vendor. Axtel *v.* Chase, 83 Ind. 546; Thomas *v.* Stickle, 32 Io. 76; Woodward *v.* Allan, 3 Dana, (Ky.) 164; Hanson *v.* Buckner, 4 id. 254; Slater *v.* Rawson, 1 Met. (Mass.) 455; Merritt *v.* Morse, 108 Mass. 275; Real *v.* Hollister, 17 Neb. 661; Loomis *v.* Bedel, 11 N. H. 83; Stone *v.* Hooker, 9 Cow. (N. Y.) 157; Fowler *v.* Poling, 6 Barb. S. C. (N. Y.) 168; Blydenburgh *v.* Cotheal, 1 Duer, (N. Y.) 196; Wood *v.* Forncrook, 3 Thomp. & Cook, (N. Y.) 303; Patton *v.* McFarlane, 3 Pa. (old Pa., not Pa. St.) 419; Poyntell *v.* Spencer, 6 Pa. 254; Steiner *v.* Baughman, 12 id. 106; Feriss *v.* Harshea, Mart. & Yerg. (Tenn.) 50, commenting on Radcliff *v.* Ship, *supra;* Callis *v.* Cogbill, 9 Lea, (Tenn.) 137; Westrope *v.* Chambers, 51 Tex. 178; Haffey *v.* Birchetts, 11 Leigh, (Va.) 88. "An eviction by legal process," it was said in Fowler *v.* Poling,

§ 135. In order, however, that such *ouster in pais* should amount to an eviction, it is necessary that the paramount title shall have been hostilely asserted.[1] For although there is a class of cases presently to be considered, which recognize the right of the purchaser to buy in the paramount title and recover in an action on the covenant the amount thus paid, yet it will be found that they refuse to sanction such recovery unless there has been a prosecution or distinct hostile assertion of such title.[2] Where such has been the case, its purchase is considered as equivalent to an eviction, as the idle form of abandoning the premises under one title in order to re-enter under another is deemed unnecessary. But if in the one case it be considered as indispensable that there shall have been a previous assertion of the paramount title, it would seem that it would be equally indispensable in the other.[3]

supra, "is not necessary, but the grantee may surrender possession to the rightful owner, and that will be a sufficient ouster to entitle him to his action in the covenant of warranty. It is true the Chancellor said in Hunt *v.* Amidon, 4 Hill, (N. Y.) 345, in the Court of Errors, that the grantee had no right to give up voluntarily to a stranger claiming by title paramount, but his remark was *obiter*, and he was evidently mistaken. In Hamilton *v.* Cutts, 4 Mass. 349, Stone *v.* Hooker, 9 Cow. (N. Y.) 154, and Greenvault *v.* Davis, 4 Hill, (N. Y.) 646, the opposite doctrine was clearly laid down, with this restriction, that when the grantee surrenders or suffers the possession to pass from him without a legal contest, he takes upon himself the burden of showing that the person who entered had a title paramount to that of his grantor." The expressions in Beebe *v.* Swartwout, 3 Gilm. (Ill.) 182, 183, which at first sight appear to conflict with this train of authority, refer entirely to the outstanding possession being one under a *paramount* title, in distinction to a mere adverse possession in its narrow and technical signification; see *infra*, p. 188.

Although in Mississippi there are expressions in the cases of Hoy *v.* Taliaferro, 8 Sm. & Marsh. 741, and Dennis *v.* Heath, 11 id. 218, which seem to advocate a more rigid rule, yet the cases were not actions on the covenant of warranty, but the breach of the covenant was attempted to be set up as a defence to the payment of the purchase money (see *infra*, Ch. XIV., where these cases are more particularly noticed), and the same remark applies to the very recent case in Tennessee of Hayes *v.* Fergusson, 15 Tenn. 1, where, after litigation, the tenant seems to have abandoned the possession of part of the leased premises, and it was held that this was no ground to rescind the lease but might work an abatement of the rent. In Witty *v.* Hightower, 12 Sm. & Marsh. 481, Clayton, J., remarked, "The utmost limit to which the cases cited by the counsel of the plaintiff go is, that an actual eviction under judgment of court is not always necessary. An ouster may be sufficient, but then the burden of proof is upon the party who has yielded the possession. Hamilton *v.* Cutts, 4 Mass. 350; Stone *v.* Hooker, 9 Cow. (N. Y.) 157. But these cases do not establish that there can be a breach of the covenant of warranty without an eviction, an ouster, or a surrender, or holding out under a paramount outstanding title." It is obvious that the utmost care must be taken to distinguish the *dicta* from the decisions upon this point.

[1] Axtel *v.* Chase, 83 Ind. 546; Knepper *v.* Kurtz, 58 Pa. 480.

[2] *Infra*, § 148.

[3] Thus, in Sprague *v.* Baker, 17 Mass.

§ 136. And in all these cases it must be borne in mind that if the purchaser choose to retire before the paramount title it is at his own risk, and in the suit against his covenantor he must assume the burden of proof and make out the adverse title to

590, it was said: "If the plaintiff had voluntarily discharged the mortgage without any previous demand made, his only remedy would have been on the covenant against incumbrances. But a demand having been made, the plaintiff might have yielded to the dispossession, and such an ouster would have entitled him to his remedy on the covenant of warranty, as was decided in Hamilton *v.* Cutts." So in Dupuy *v.* Roebuck, 7 Ala. 488, it was said: "It was necessary that some particular act should be shown by which the plaintiff was interrupted, otherwise the breach of covenant for quiet enjoyment would not be well assigned. If a demand was made, the plaintiff, it was said, might yield to the dispossession;" while in Hagler *v.* Simpson, 1 Busb. (N. C.) 386, where the plaintiff gave up the possession of the premises soon after their recovery from him in ejectment, this was held to be no eviction. "*Non constat* that he would have been disturbed in his possession had he remained upon the premises." In Moore *v.* Vail, 17 Ill. 190 (and see this case, *infra*, p. 183, n. 2), the law was thus well stated by Eaton, J.: "The older authorities undoubtedly hold that there could be no breach of a common warranty of title or warranty for quiet enjoyment, until the covenantee had been actually evicted or turned out of the premises. The spirit of such a covenant, and the manifest justice of the matter, soon began to prevail over such an extremely literal interpretation of the intention of the parties. And it was held that where at the time of the execution of the covenantee the premises were in the actual possession of another, who held them under a paramount or perfect title, then the covenant was broken as soon as it was made; for the party should not be put to the useless expense, delay, and trouble to bring ejectment to get the possession, when it would certainly prove unavailing; nor should he be required to commit an actual trespass upon the real owner in order to get possession, that he might himself be turned out of possession. But this is not the only case of constructive eviction which may now be considered as well settled by authority and sustained by sound principles of morality and justice. If the covenantee be in the actual possession of the estate, he has the right to yield that possession to one who claims it under a paramount title, without resisting him by force or by litigation; and this is sustained by the same reasons of justice and good government which are applicable to the first exception. This, however, is not to be understood as holding that the mere existence of a paramount title constitutes a breach of the covenant, or that it will authorize the covenantee to refuse to take possession when it is quietly tendered to him, or when he can do so peaceably, and then claim that by reason of such paramount title and his want of possession the covenant is broken; nor will it justify him in abandoning the possession without demand or claim by the one holding the real title. His possession under the title acquired with the covenant is not disturbed by the mere existence of that title; and he has no right to assume that it ever will be, until he actually feels its pressure upon him. He must act in good faith towards his covenantor, and make the most of whatever title he has acquired, until resistance to the paramount title ceases to be a duty to himself or his covenantor. While he is not bound to contest where the contest would be hopeless, or resist where resistance would be a wrong, yet always where he yields without a contest or resistance he must take upon himself the burden of showing that the title was paramount, and that he yielded the possession to the pressure of that title. Whenever he does yield quietly, he does so at his peril." And this has since been approved. Allis *v.* Nininger, 25 Minn. 525.

which he has yielded, with as much particularity as if he were suing in ejectment,[1] unless, of course, the adverse right of possession has been established by a judgment or decree in a suit of which the covenantor had been properly notified, in which case the burden of proof will not only be removed, but the judgment or decree will be conclusive evidence of the validity of the paramount title.[2]

§ 137. The result of the authorities would therefore seem to be that where the holder of the adverse title has the right summarily to obtain possession under it and adversarily asserts or prosecutes that right, the covenantee may anticipate its actual exercise and voluntarily surrender the possession, by which *ouster in pais* a sufficient eviction will be caused to support an action on the covenant, in which, however, he will be obliged to prove that the results which he thus anticipated were inevitable.

The foregoing cases, in which there has been either an adversary dispossession or a compulsory yielding up of the possession, illustrate what is generally termed *actual* eviction.

§ 138. Under the head of *constructive* eviction may be considered first, the cases in which an eviction is deemed to be caused by the inability of the purchaser to obtain possession by reason of the paramount title.

In the old case of Holder *v.* Taylor,[3] the plaintiff having brought covenant upon the warranty implied by the word *demise* in a lease, proved a prior lease to a stranger and possession by him; and upon objection that the plaintiff showed no actual entry on his part and expulsion of the stranger, it was held that the word *demise* implied a *power* of leasing, which, if it did not exist, was broken as soon as made,[4] and also that it was not reasonable to force the lessee to enter upon the land and so commit a trespass; "but," the court added, "if it were an express covenant for quiet enjoying, then perhaps it were otherwise."

This supposition was, however, soon after met by the case of Cloake *v.* Hooper,[5] where lands were conveyed by the defendant to

[1] Thomas *v.* Stickle, 32 Io. 76; Hamilton *v.* Cutts, 4 Mass. 350; George *v.* Putney, 4 Cush. (Mass.) 355; Witty *v.* Hightower, 12 Sm. & Marsh. (Miss.) 481; Snyder *v.* Jennings, 15 Neb. 372; Stone *v.* Hooker, 9 Cow. (N. Y.) 157; Greenvault *v.* Davis, 4 Hill, (N. Y.) 643; Callis *v.* Cogbill, 9 Lea, (Tenn.) 137; Peck *v.* Hensley, 20 Tex. 678; Westrope *v.* Chambers, 51 id. 178.

[2] *Supra*, § 125.

[3] Hob. 12.

[4] As to this see *infra*, Ch. X.

[5] Freem. 122.

the plaintiff, with a covenant for quiet enjoyment, and the latter having averred that the lands belonged to the king, who had previously conveyed them, a demurrer by the defendant that the plaintiff did not allege an entry and so could not be disturbed, was held bad, the court saying, "The declaration is good enough; for having set forth a title in the patentee of the king, the plaintiff shall not be enforced to enter and subject himself to an action by a tortious act." So in a more recent case in the King's Bench, the plaintiff declared on a covenant for quiet enjoyment in a lease for years determinable on lives, alleging that he was never in possession, that he had been refused attornment by the tenant, and subsequently defeated by him in an ejectment, on the ground of a prior lease granted by the defendant. The latter pleaded that for the first half-year after the date of his lease the plaintiff might have entered and enjoyed, but that for non-payment of the rent for twenty-one days after that time the defendant had a right of re-entry which he exercised; and upon demurrer, the court held that the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which could not have taken place here on account of the prior lease granted, and which was averred to be then subsisting, and judgment was accordingly given for the plaintiff.[1]

And here again we were at first more conservative in America. In a case before the Supreme Court of the United States in 1825,[2] where the plaintiffs alleged first, that by reason of a want of title in their grantor they had been unable to obtain possession of the premises, and secondly, that they had been ousted from the said premises, it was said, "These averments are in opposition to each other. But the allegation that possession has never been obtained is immaterial because not a breach of the covenant, and a majority of the court are disposed to think may be disregarded on a general demurrer." And such was the actual decision in New York in Kortz *v.* Carpenter,[3] where the breach of the covenant for quiet enjoyment being alleged to be that at the date of the deed to the plaintiff, and long before, the premises were adversely, by

[1] Ludwell *v.* Newman, 6 Term, 458. In Hawkes *v.* Orton, 5 Adolph. & Ellis, 367, judgment was rendered for the defendant by reason of there being no evidence of the breach as stated in the declaration. But the court seem to have thought that a refusal to give possession might, if properly averred, be a breach of the covenant for quiet enjoyment.

[2] Day *v.* Chism, 10 Wheat. (S. C. U. S.) 452, per Marshall, C. J.

[3] 5 Johns. (N. Y.) 120.

lawful title and right, held, possessed, and enjoyed by the proprietors of the Hardenbergh patent, this was held bad, on general demurrer, as not showing an eviction. So in a subsequent case in the same State,[1] it was said that if the covenantee never had had the possession, however hard the case might be, no action would lie on the covenant for quiet enjoyment — that he should have protected himself by other covenants.

But such a view of the law, which seems to have been supported by no other authority than the *dictum* in Holder *v.* Taylor,[2] has failed to receive approval, and the reasons upon which the opposite doctrine is based have been nowhere stated more forcibly than in the case of Grist *v.* Hodges,[3] in North Carolina, where Ruffin, J., in delivering the opinion of the court, said: "The existence of an incumbrance, or the mere recovery in a possessory action under which the bargainee has not been actually disturbed, are held, for technical reasons, not to be breaches of a covenant for quiet possession, or, in other words, of our warranties. But that is a very different case from this, in which the bargainee never in fact was in possession, but was kept out by the possession of another, under better title existing at the time of sale and deed, and ever since. The case of Kortz *v.* Carpenter is of the same character. But it is distinguishable from the present, for there had been no attempt in that case to get possession. Here there was, by ejectment.[4] I do not, however, think that was necessary; but the existence of a better title, with an actual possession under it in another, is of itself a breach of the covenant.[5] It is manifestly just that it should be so considered; for otherwise the covenantee would have no redress but by making himself a trespasser by an actual entry, which the law requires of nobody, or by bringing an unnecessary suit, for the event of that suit proves nothing in the action on the covenant."[6] The general principle thus ably ex-

[1] St. John *v.* Palmer, 5 Hill, (N. Y.) 601.

[2] *Supra*, p. 179.

[3] 3 Dev. 200.

[4] The breach assigned was an eviction by one Wingfield, and the evidence was that Wingfield was in actual possession of the property, and that the covenantee had brought an ejectment against him and failed therein by reason of Wingfield's paramount title.

[5] *Aliter* of course where there is no actual possession and the paramount title was not proved. Thus in the very recent case of Wilder *v.* Davenport, 58 Verm. 642, there was merely a deed under what was alleged but not proved to be the paramount title, but no possession, and it was obviously held that this was no eviction.

[6] The technical reasons for the rule were then thus stated by the court: "But upon purely legal grounds it is so. For as

plained has been recognized and applied in many other cases,[1] and an analogy may be found in the old common law, which, although strictly requiring livery of seisin to accompany every feoffment, allowed the feoffee, where he dare not enter through fear of his life or of bodily harm, to make a yearly continual claim, as near the land as possible, which would be "a good entry in law."[2]

§ 139. The rule, therefore, as best supported by reason and authority, would seem to be this: where, at the time of the conveyance, the grantee finds the premises in possession of one claiming under a paramount title, the covenant for quiet enjoyment or of warranty will be held to be broken, without any other act on the part of either the grantee or the claimant; for the latter can do no more towards the assertion of his title, and as to the former the law will compel no one to commit a trespass in order to establish a lawful right in another action.[3]

between the bargainor and bargainee, the latter is in by force of the statute of uses. It is upon that idea that the legal estate is acquired by a deed of bargain and sale. It passes the use and the statute carries the possession. It is so in the conveyance by lease and release. There must be a possession for the latter to operate on. But it is not an actual possession; at least the actual entry need not be proved. The statute transfers the possession, and the lessor cannot say it was not actual for the purpose of defeating his subsequent release. As between the parties, then, the bargainee is, on strict principles, in; but if there be in reality an adverse possession he can only be held to be in for an instant, for there will be no implication against the truth further than is necessary to make the deed effectual for its purposes. If such adverse possession be upon title paramount, then there is an eviction of the bargainee *eo instanti* that the possession conferred by the statute takes place, or the eviction need not be by process."

[1] Caldwell *v.* Kirkpatrick, 6 Ala. 60; Banks *v.* Whitehead, 7 id. 83; Playter *v.* Cunningham, 21 Cal. 229; Small *v.* Reeves, 14 Ind. 164; Cummins *v.* Kennedy, 3 Littell, (Ky.) 123; Barnett *v.* Montgomery, 6 T. B. Mon. (Ky.) 328; Curtis *v.* Deering, 12 Me. 501; Blanchard *v.* Blanchard, 48 id. 174; Matteson *v.* Vaughn, 38 Mich. 373, *infra*, p. 184, n. 2; Dennis *v.* Heath, 11 Sm. & Marsh. (Miss.) 206; Witty *v.* Hightower, 12 id. 478; Green *v.* Irving, 54 Miss. 450; Blondeau *v.* Sheridan, 81 Mo. 545; Loomis *v.* Bedel, 11 N. H. 74; Chandler *v.* Brown, 59 id. 370; Miller *v.* Halsey, 2 Green, (N. J.) 59; Gardner *v.* Keteltas, 3 Hill, (N. Y.) 330; Mills *v.* Rice, 3 Neb. 76; Wilder *v.* Ireland, 8 Jones L. (N. C.) 87; Randolph *v* Meeks, Mart. & Yerg. (Tenn.) 58; Duval *v.* Craig, 2 Wheat. (S. C. U. S.) 62; Noonan *v.* Lee, 2 Black, (S. C. U. S.) 507; Phelps *v.* Sawyer, 1 Aik. (Verm.) 158; Park *v.* Bates, 12 Verm. 381; University of Vermont *v.* Joslyn, 21 id. 52; Sheffey's Exrs. *v.* Gardiner, 79 Va. 313; Rex *v.* Creel, 22 W. Va. 373; Moreland *v.* Metz, 24 id. 119. In Moore *v.* Vail, 17 Ill. 185, the court said, "We admit the principle of law claimed that if at the time this conveyance was executed the premises were actually in possession of a third party claiming under a paramount title, that of itself amounted to an eviction *eo instanti*." See this case, *infra*, p. 183, n. 2.

[2] Co. Litt. 53 *n*.

[3] Fritz *v.* Pusey, 31 Minn. 368; Murphy *v* Price, 48 Mo. 250; Rea *v.* Minkler, 5 Lans. (N. Y.) 296; Clark *v.* Conroe, 38 Verm. 475; Russ *v.* Steele, 40 id. 315.

§ 140. It remains to inquire how far such a rule would apply where, as is often the case in this country, the land is without actual occupation or possession by any one. With respect to wild and uncultivated lands, it has long been settled on this side of the Atlantic that the owner is to be deemed in possession so as to enable him to bring trespass against a wrongdoer, on the ground that the legal seisin draws with it the possession unless there is at the time an actual adverse possession.[1] When such land is conveyed by deed taking effect under the statute of Uses, a constructive possession is given to the grantee.[2]

And to the same effect is Rex *v.* Creel, 22 W. Va. 373. In the very recent case in New York of Shattuck *v.* Lamb, 45 N. Y. App. 499, the subject was almost considered as *res integra* and all the authorities elaborately considered; the case of Kortz *v.* Carpenter was distinctly overruled, and the statement in the text approved, Dwight, J., dissenting. In Murphy *v.* Price, *supra*, this rule was applied to a case arising under the statutory covenants implied from the words "grant, bargain, and sell" (*infra*, Ch. XII.); and in Russ *v.* Steele and Rea *v.* Minkler, *supra*, an existing, hostilely asserted paramount right of way was held to be an eviction to the extent of the adverse right. But in McMullan *v.* Wooley, 2 Lans. (N. Y.) 395, the right to draw water through pipes from a spring was held to come only within the scope of a covenant against incumbrances as it was not considered to be a deprivation of part of the land.

[1] Proprietors of Kennebeck *v.* Call, 1 Mass. 484; Van Brunt *v.* Schenck, 11 Johns. (N. Y.) 385; Mather *v.* Trinity Church, 3 Serg. & Rawle, (Pa.) 514; Bush *v.* Bradley, 4 Day, (Conn.) 306. When the cases say that this rule applies only when there is no adverse possession, this is principally intended to preserve the effects of the statutes of limitation, as those statutes would be totally useless in case an actual, visible, and notorious possession for the prescribed length of time could be defeated by the constructive possession given to the true owner. As between parties claiming by title, the possession would of course follow the better title. In the note to Taylor *v.* Horde, 2 Smith's Lead. Cas., the student will find the numerous cases upon this subject classified.

[2] Moore *v.* Vail, 17 Ill. 185. In this case the question arose with respect to the statute of limitations. In an action on the covenant of warranty, it was proved that at the time of the sale to the plaintiff in 1836 the premises were in the actual possession of one Lynch, *who however did not claim to be in possession under color of title*, and who soon after left them vacant, in which state they continued until 1842, when Mrs. Lynch, *who then held the paramount title*, took possession. "The defence now insisted upon," said the court, "is the statute of limitations. It is not denied that the title has failed and that there has been in contemplation of law an eviction so as to give the right of action on the covenants; but it is insisted that the title failed and that a technical eviction accrued on the first day of September, 1836, the moment the deed was executed, which was more than sixteen years before this action was brought. We admit the principle of law as claimed, that if at the time this conveyance was executed the premises were actually in the possession of a third party claiming under a paramount title, that of itself amounted to an eviction, *eo instanti* [citing the text]. From the facts already stated, does it appear that on the first of September, 1836, Lynch held possession of the premises under an adverse paramount title? The presumption is that he held in subordination to the title which he had conveyed to Collins, and there can be no doubt that he might have been dispossessed, under the

But it does not follow that such constructive possession is of itself equivalent to an actual entry and possession by the grantee; for until the better title shall have been adversely asserted, the position remains the same. As to what shall be considered such assertion of title, it is in the first place held that a mere sale to the true owner is not such an assertion. Thus in a case in New Hampshire, where two tenants in common were the true owners of land which was a wilderness without possession by any one, and one of them sold his share, the plaintiff, who had received a deed for a defective title with covenant of warranty, brought suit against his grantor, claiming that as the land was a wilderness the strongest evidence of claiming title was by conveying it. But it was held that this, without more, was no ouster or disturbance.[1] In a late case in Michigan the law was held the same way,[2] and

deed of conveyance on which this suit is brought, by an action of ejectment. The continued possession of Lynch, not being under paramount title nor even adverse to the plaintiff's title, did not constitute an eviction so as to give the plaintiff a cause of action on his covenant of warranty. The plaintiff's constructive possession continued until it was actually interfered with by the owner of the paramount title. Until that time he might peaceably have entered upon and enjoyed the premises without resistance or molestation, which was all his grantors covenanted he should do. They did not guarantee to him a perfect title but the possession and enjoyment of the premises. There was no interference with this till Mrs. Lynch entered and took possession of the property in 1842. This entry being by paramount title, although peaceable and without opposition from the covenantee, was at least a constructive ouster and a breach of the covenant. Then, for the first time, an action accrued upon this covenant, and not till then did the statute of limitations begin to run." The distinction is here stated with great clearness.

[1] Loomis *v.* Bedel, 11 N. H. 74.

[2] Matteson *v.* Vaughn, 38 Mich. 373. At first sight, the case might not appear to sustain this position. The plaintiff, who held a defective title to wild land, was preparing to enter and cut timber on it, and was, in a neighboring town, warned by the true owner of an undivided moiety that he would be prosecuted if he did, whereupon the plaintiff sued on the covenants for seisin, against incumbrances, and of warranty. The court below held that the action on the two former was barred by limitation, but allowed a recovery for half the consideration, and interest from the date of the supposed eviction. The plaintiff brought error, claiming that none of the causes of action were barred, and that the damages should have been the whole consideration money, with interest from the date of the deed. The defendant brought no error, and the judgment was affirmed, but on this ground only. The court had no doubt as to the bar of the statute. But it said: "So far as the covenant of warranty is concerned, the situation is peculiar. Vaughn (the grantor of the defective title) never had either title or possession. His void deeds could not draw possession after them by construction. The constructive possession, if anywhere, was in the grantees of the United States from the beginning. And inasmuch as Matteson (the grantee, plaintiff) was never in possession actually or constructively, it is difficult to see what difference there is between his original and his present position. He is no more excluded now than he has always been. We do not comprehend how he can be

very recently in Mississippi the doctrine was carefully considered and approved.[1] But an exception was considered to exist where

said to have been evicted. An eviction, according to all the best authorities, means some change in the possession of the party by the disturbance of an actual or constructive possession, which has been displaced by a paramount title to which the party has been compelled by law or by satisfactory proof of genuineness to submit. Some of the authorities hold that there can be no eviction of one who is not in actual possession. Others more liberally extend the rule to a constructive possession. But it would be going to an absurd length to hold that a person can be said to have been disturbed or evicted when he has never had either kind of possession. As was well remarked by the Supreme Court of New York in St. John *v.* Palmer, 5 Hill, 599 (*infra*, p. 187, n. 2), 'The mere fact of a superior title in a third person can never amount to a breach of the covenant of quiet enjoyment. The possession of the covenantee must be disturbed — he must be evicted — by the person having the better title.' In that case the plaintiffs were held to be in by constructive possession, and therefore capable of being ousted under a mortgage derived from the same source of title. But the necessity of some real or constructive possession was plainly asserted and recognized. The authorities are fully considered in Rawle on Covenants. The doctrine of the case in 5 Hill is quite as liberal as justice and good sense will warrant. . . . As in our opinion the plaintiff in error *has a larger judgment than he could lawfully obtain under the facts set out in the record*, [the italics are those of the author of this treatise,] he has no cause of complaint," — showing that if the defendant had excepted, judgment would have been given in his favor.

[1] Green *v.* Irving, 54 Miss. 450. The court, after referring to the general principles stated in the text, said: "It may be said, however, that although their principles are correct as applicable to land which is susceptible of actual occupation, a different rule should prevail as to wild lands; that as to these no length of constructive possession will ripen an imperfect into a perfect title; that inasmuch as the owner of the defective title is not in possession, it should not be deemed essential that the true owner should make any demand upon him, or that the true owner should be required to signify his assertion of title by taking possession of a wilderness or bringing suit against a party who is not interfering with his rights. These considerations seem cogent and persuasive and we confess that we have found it difficult to resist them. It will be found, however, that to yield to them will be to do violence to the immemorial principles underlying and governing the covenant of warranty of title, and practically to abolish the distinction between that covenant and those of seisin and of right to convey. . . . Another reason, more technical but perhaps not less satisfactory, exists for requiring some hostile assertion of the paramount title to wild lands before the vendee can maintain suit upon the covenant of general warranty. By the deed which he receives he is vested with the possession of his vendor. In England, where livery of seisin was anciently required to convey possession, this effect was accomplished by deed of bargain and sale, by virtue of the statute of Uses, which drew the possession to the use. Whenever, therefore, actual possession upon the part of the vendee was necessary to enable him to assert any right against the vendor, the latter was estopped to deny that such possession had been conveyed. . . . If the law, in the interests of the vendee, will presume a possession and ouster where the premises are in the actual possession of the true owner, *a fortiori* in the case of wild lands will it, for the protection of the vendor, require a constructive ouster from this presumed possession by hostile assertion of the paramount title before suit can be instituted upon the covenant. We are not compelled in this State to resort to the statute of Uses, because by our law livery of seisin was never required, and the possession passes with the deed. Code of 1857, c. 36, § 1, art. 1; Code of 1871, § 2294. We

the sale and conveyance are by the same vendor, to a third person, of a good title subsequently acquired,[1] or by a sovereign State,[2] for in the latter case the sale is such an authentic and public act as to amount to a declaration that it claims title and by the act conveys it to a person other than the one in possession.[3] Still

have not been referred by counsel to any case which announces a different doctrine on the subject under consideration where wild lands are involved from that which obtains in other cases, nor have our own researches disclosed one."

[1] Upon a reargument, upon another point, the court said: "We remain satisfied that a mere conveyance of the paramount title by the true owner will not ordinarily amount to a sufficient assertion against a vendee, holding under a defective title, to justify an abandonment and suit by him on his covenants; but as between private persons we would qualify this doctrine by the remark that if it is the immediate grantor in the defective conveyance who has made a subsequent valid conveyance, his vendee under the first deed might abandon and bring suit; and in such case the covenantor would not be allowed to say that there had been no hostile assertion of the true title, because his act would amount to a disaffirmance and annulment of the only title the vendee had. Thus in the case at bar, if Green had made Irving an invalid deed, and had subsequently conveyed by proper deed to another, Irving could maintain his suit. Can he do so because Green's vendor has made such conveyance? If Green's vendor were a private person, he could not, because such a transaction would be as to him *res inter alios acta*, and could not give him any new rights against Green."

[2] Green *v.* Irving, *supra*.

[3] On the first argument, the court held that no such qualification existed. "The reargument was granted on one point only; namely, conceding that the principles announced in the former opinion were correct where the paramount title resides in a private person, should a different rule prevail in this case because of the fact that the State was the true owner? . . . Green's vendor, who had first made an invalid patent to him, and subsequently a valid one in disaffirmance of the first, was the State of Mississippi. Does this change the result? Upon mature reflection we think that it does. Our conclusion is that wherever the paramount title to land resides in the State, a sale by the State amounts to a hostile assertion of that title against all the world; and that persons in possession under defective titles may at once abandon as upon eviction and institute suits against their covenantors, even where their own titles are not derived from the State. Several considerations lead to this conclusion. A sale by the State must be regarded as a hostile assertion against all in possession of its lands, because ordinarily it is the only way in which the State can make it. Its impersonal character renders it impossible for the State to make demand of possession, nor could it be surrendered to it save by leaving the land unoccupied. It has no officer whose duty or right it would be to make such demand or receive possession. If the State can bring an action of ejectment, it would be impossible to execute in its behalf a writ of *habere facias possessionem*. In making a sale, the State declares in the most authentic and public manner that it claims title and by the act conveys it to a person other than the one in possession. It is not perceived how else the State could assert its title except by an act of the legislature; and it could not be expected that there should be a legislative act for every separate parcel of State land wrongfully occupied by a private individual. When by patent the State conveys title, the act is that of all its citizens, and all of them therefore must be supposed to be aware of it, so far as their rights can be affected thereby. A vendee in possession under an invalid deed may abandon whenever the true owner has said to him, 'You are on my land and I want it.' The State must be considered as having said this whenever it makes a sale. It claims

another exception has been held to exist in the case of a public sale of the paramount title and its purchase by the covenantee of one claiming through a defective title.[1] But although a mere conveyance of the better title will not, in general, be such an adverse assertion of it as to amount to an eviction, yet it is otherwise when adversary proceedings have been commenced and a decree of possession obtained. Thus in a case in New York, the defendants, owners of a vacant lot, having mortgaged it to a third person, conveyed it, with a covenant for quiet enjoyment, to the plaintiffs. The mortgagee foreclosed by proceedings to which he made the plaintiffs parties, obtained a decree that possession be delivered to the purchaser, and bought in the property at the master's sale. In an action on the covenant the court held that this was an eviction.[2]

the land by making out the patent. It declares that it wants it when it receives the money for it; because, ordinarily, the State has no use for land except to sell it, and can use it in no other way."

From this judgment Campbell, J., dissented, on the ground that "a conveyance by the State or an individual does not constitute a breach of the covenant of warranty, because it is neither a turning out, nor a holding out, of possession. It in no way affects the rights of the covenantee as to possession. It leaves him just as he was, and it may be that the title acquired by the second conveyance will never be asserted. If not, he is unaffected. If it shall be, then he may yield to it and entitle himself to an action on his covenant."

[1] Loomis *v.* Bedel, 11 N. H. 74. This case is thus well stated in Green *v.* Irving, 54 Miss. 450, *supra*, p. 185, n. 1. Tillotson and Eastman, tenants in common, were the true owners of the land, which was a wilderness. Stephenson held a deed from another claimant. No one was in possession. Tillotson died, and his administrator, by order of the proper court, sold at public auction the interest of his intestate in the lands. Stephenson attended the sale and bought in this interest. About the same time Eastman, the other joint owner of the true title, sold to a stranger. Thereupon Stephenson brought his action against his covenantor as upon an eviction from the whole. It was held that his suit could be maintained as upon an eviction from the undivided moiety which had belonged to Tillotson, because the obtaining by the latter's administrator of leave to sell was an assertion of his intestate's title, and Stephenson had the right to attend the sale and buy it in; but that as to Eastman's portion he could not recover, it not being shown that Eastman or his vendee had taken any steps to assert his title; and it was said that the bare fact that Eastman had sold to another was not such hostile assertion of his title as warranted an abandonment by Stephenson or a suit against his covenantor.

[2] St. John *v.* Palmer, 5 Hill, (N. Y.) 599. "In the cases which have been cited," said the court, [these cases were Waldron *v.* McCarty, 3 Johns. 471; Kortz *v.* Carpenter, 5 id. 120; Kerr *v.* Shaw, 13 id. 236; Webb *v.* Alexander, 7 Wend. 281,] "the covenantee either remained in possession without any actual ouster before suit brought, or else he never had any possession, either actual or constructive. In the case before us, as the premises were wholly unoccupied the legal seisin followed the title. The plaintiffs had the constructive possession the moment they received the deed and could have maintained trespass against any one who should enter on the land without title. They were in such a condition that an ouster or disseisin might follow. How have the plaintiffs been evicted? When the mort-

§ 141. Before dismissing the class of cases upon the subject of an eviction being caused by the grantee's inability to obtain the possession, it must be repeated that such possession must be under a title actually paramount, and not an adverse possession such as might ripen by lapse of time under the limitation acts into a perfect title. Such a possession might, according to some authorities, cause a breach of the covenant for seisin;[1] but there appear to be none which decide that it would cause a breach of the covenant of warranty or for quiet enjoyment. On the contrary, in an early case in Vermont,[2] and more recently in Illinois and New York, it has been held that such a possession was no breach of these covenants.[3]

gagee acquired a paramount title under the mortgage, the legal seisin — the premises still being unoccupied — immediately passed from the plaintiffs to him. He then had the constructive possession and could maintain trespass against the plaintiffs as well as any one else who should enter on the land. This would not be enough without showing that the mortgagee had asserted his title to the land. The mere fact of a superior title in a third person can never amount to a breach of the covenant for quiet enjoyment. The possession of the covenantee must be disturbed — he must be evicted — by the person having the better title. It is not necessary, however, that he should be evicted by legal process; it is enough that he has yielded the possession to the rightful owner, or that such owner has entered, the premises being vacant, and taken possession. Greenvault *v.* Davis, 4 Hill, 643. The mortgagee has asserted his right. He filed a bill in chancery for the purpose of perfecting his title under the mortgage, and made the defendants, as well as the plaintiffs, parties to the suit. And he not only acquired a perfect paper title by the foreclosure and the sale, but there was a decree against all the parties to the present action that he should be let into the possession of the property and that possession should be delivered to him. All parties have acquiesced in the decree. As there was no actual possession in the plaintiffs or any one else, no formal act was necessary for the purpose of giving the mortgagee the complete enjoyment of his legal rights. It would have been an idle ceremony to issue a writ of assistance or any other execution on the decree. The decree was executed the moment the mortgagee received the master's deed. And thus the constructive possession, or legal seisin, which was in the plaintiffs, was by the acts of the parties and the operation of law transferred to the mortgagee. He has since exercised acts of ownership over the property, and no one has questioned his right to do so. I think there has been such an eviction of the plaintiffs as amounts to a breach of the covenant."

[1] *Supra*, § 42 *et seq.*

[2] Phelps *v.* Sawyer, 1 Aik. (Verm.) 157.

[3] Beebe *v.* Swartwout, 3 Gilm. (Ill.) 183 (where the subject was elaborately examined both by counsel and the court); Moore *v.* Vail, 17 Ill. 185, *supra*, p. 183, n. 2. In Jenkins *v.* Hopkins, 8 Pick. (Mass.) 350, the law was incidentally considered as so settled: "The depositions show an actual possession and occupation and payment of taxes by several persons, but there is no legal evidence of this title. . . . The fact of possession as proved by the witnesses stands disconnected from any title, and therefore we cannot know that it was not unlawful, and if it was so it is no breach of the covenant of warranty." In Rindskopf *v.* Farmers' Loan Co., 58 Barb. (N. Y.) 49, lands were conveyed by the defendant with a covenant of general warranty. They were at the time held by third parties claiming adversely to the

§ 142. The next class of cases under the head of constructive eviction is that which holds that an eviction will be caused by the covenantee having compulsorily purchased or taken a lease under the paramount title, without any actual change of possession, both in cases where the validity of such title has been established by the judgment or decree of a court of competent jurisdiction, and under certain circumstances where it has not been thus established.

In opposition to such a doctrine it has often been urged that it confounds all distinctions between a covenant for seisin and a covenant for quiet enjoyment or of warranty, and it has also been argued that an analogy exists to the rule which prohibits a tenant from disputing his landlord's title unless there has been an eviction under the paramount claim.

But in answer to such an analogy, it may be said first, that whatever may have been the origin of this rule,[1] or its earlier application, it is now settled that wherever the landlord's title is insufficient for the security of the tenant the relation between them may be renounced, and the latter may protect himself under the paramount title;[2] and this is held to be a constructive evic-

defendant, whose possession, however, had not yet ripened into title, but subsequently did so before suit brought; and it was held in an action on the covenant, that there could be no recovery. "The plaintiff," said the court, "has not lost his right in the land by a title paramount existing at the time the covenant in question was made by the defendant, but by his own laches in suffering an imperfect and inferior claim of title to become a legal title paramount to his."

[1] It is now well settled that except where the lease was by indenture this doctrine is of modern origin, and was never heard of till towards the close of the last century. In the first three editions of this treatise, some space was devoted to this subject (Covenants for Title, pp. 262–268, 3d ed.); but since their publication it has been discussed by several learned authors, as also from the bench, and need therefore only be incidentally referred to at this time. See an able article on Estoppel of Tenant to deny his Landlord's Title, in American Law Review, October, 1871; Bigelow on Estoppel (4th ed.), ch. xiv.; Notes to Moss *v.* Gallimore, and Duchess of Kingston's case, 2 Smith's Lead. Cas. (8th ed.); and an elaborate opinion by Woodruff, J., in Moffat *v.* Strong, 9 Bosw. (N. Y.) 57.

[2] Thus payment of rent by the tenant to a mortgagee claiming under a mortgage prior to the lease and who has at that time a right of entry, is a sufficient defence in an action for rent by the landlord. Magill *v.* Hinsdale, 6 Conn. 469; Chambers *v.* Pleak, 6 Dana, (Ky.) 428; Smith *v.* Shepard, 15 Pick. (Mass.) 147; Stone *v.* Patterson, 19 id. 476; Welch *v.* Adams, 1 Met. (Mass.) 494; George *v.* Putney, 4 Cush. (Mass.) 355; Jones *v.* Clark, 20 Johns. (N. Y.) 61; Simers *v.* Saltus, 3 Den. (N. Y.) 216; Greeno *v.* Munson, 9 Verm. 37; Pope *v.* Biggs, 9 Barn. & Cress. 245. See Mayor of Poole *v.* Whitt, 15 Mees. & Wels. 577; Waddilove *v.* Barnett, 2 Bing. N. C. 538; Franklin *v.* Carter, 1 Com. Bench, 760; Graham *v.* Alsopp, 3 Exch. 198; Doe *v.* Barton, 11 Ad. & Ell. 314.

tion.[1] The exceptions to this application of the rule are sufficiently obvious. The analogy, therefore, if any really exist, is, according to the later cases, rather in favor of than against the doctrine now under consideration.

And secondly, it would seem clear that the reasons in favor of a somewhat rigid adherence to the rule that a tenant shall not dispute his landlord's title lose their force when applied to a conveyance purporting to pass the whole estate of the grantor and to leave no reversion in him.[2] For the relation of landlord and tenant imposes upon both parties greater rights and obligations than that of vendor and purchaser.[3] There seems no obligation of allegiance and loyalty on the part of the latter towards the title he has received. The mischief to which, as between landlord and tenant, the absence of such a rule must lead, would evidently be that a tenant, having obtained the possession from his landlord, could betray it to another, and thus drive the former to an ejectment to regain the possession, and no landlord would ever be safe from the prospect of litigation.

[1] Thus in Ross *v.* Dysant, 33 Pa. 454, it was said : "Nor is it necessary for the tenant to be actually removed from the premises to give him a good defence against rent. Writs of *habere faeias possessionem* are well executed when the tenant attorns to the plaintiff therein. And the taking of a lease or contract of purchase under pressure of such writ, where there is no fraud or collusion, is an actual eviction in law, which dissolves the relation between the tenant and his original landlord." Nor need the pressure be that of a writ. "If a party," said Chief Baron Pollock, "having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold, and will consent to hold under you,' that, according to good sense, is capable of being well pleaded as an expulsion." Mayor of Poole *v.* Whitt, 15 Mees. & Wels. 577 ; and see *accord.* Morse *v.* Goddard, 13 Met. (Mass.) 177 ; George *v.* Putney, 4 Cush. (Mass.) 354 ; Clapp *v.* Coble, 1 Dev. & Batt. Ch. (N. C.) 177 ; Bigelow on Estoppel (4th ed.), 464, 465.

[2] Thus the rule would never be applied to the case of one who had received a conveyance in fee containing a reservation of a ground-rent to the grantor. Brown *v.* Dickerson, 12 Pa. 372. The case of Naglee *v.* Ingersoll, 7 id. 185, will, on examination, be found not to contradict this. "The fourth plea," said Bell, J., "is either a *nil habuit in tenementis*, which in covenant is bad on demurrer, or it is tantamount to a plea of eviction. But neither of the latter pleas set out the name of the evictor, or allege that he entered upon the defendant's possession by virtue of a *lawful title acquired before or at the time of the grant to the defendant.* This averment is absolutely essential to the sufficiency of such plea."

[3] Blight *v.* Rochester, 7 Wheat. (S. C. U. S.) 548 ; Walden *v.* Bodley, 14 Pet. (S. C. U. S.) 156 ; Watkins *v.* Holman, 16 id. 54 ; Page *v.* Hill, 11 Mo. 149 ; Osterhout *v.* Shoemaker, 3 Hill, (N. Y.) 518 ; Kenada *v.* Gardner, 3 Barb. S. C. (N. Y.) 589 ; Averill *v.* Wilson, 4 id. 180 ; Bigelow *v.* Finch, 11 id. 500 ; James *v.* Patterson, 1 Swan, (Tenn.) 311 ; Winterbottom *v.* Ingham, 7 Q. B. 611.

Hence the tenant's obligation to restore to him the possession.[1] But, as between vendor and purchaser, there can be no such danger. By the contract, as intended to be fulfilled, the title and possession leave the vendor never to return to him, and with the execution of the conveyance, as a general rule, all the relations between the parties cease, except those arising from the purchaser's obligations with respect to the unpaid purchase-money and his rights upon the covenants which he has received.

§ 143. Hence it may safely be said that in those courts which hold that a constructive eviction is caused by a tenant being obliged, on pain of dispossession, to accept a lease under the paramount title, it would *a fortiori* be held that a constructive eviction, amounting to a breach of the covenants of warranty or for quiet enjoyment, would be caused by the purchase of such title, by whomever might be entitled to the benefit of the covenants, and such would appear to be the present general course of decision.

In the early case in New York of Waldron *v.* McCarty,[2] the plaintiff, in an action on the covenant of warranty, averred that at the execution of the deed to himself the premises were incumbered with a mortgage, that they were afterward sold under a decree of the Court of Chancery for the principal and interest due on the mortgage, and that he had been obliged to purchase them in order to prevent his being deprived and ousted of the same; to which the defendant demurred, and the demurrer was sustained, Spencer, J., who delivered the opinion, saying, "In good sense, the covenant for quiet enjoyment has reference merely to the undisturbed possession, and not to the grantor's title. In the present case, judging from the deed, it was never the intention

[1] Or, as has been well expressed in Judge Hare's note to the Duchess of Kingston's case, "A recovery cannot be had in ejectment without proof of title and may be defeated by proving an outstanding title in a third person. The effect of allowing a tenant to deny the right of the landlord would be to take the estate from the latter and confer it on the former whenever there was a defect either in the title itself or the evidence brought forward to sustain it. The law consequently does not tolerate a course which is equally inconsistent with public policy and private faith, and would lead a prudent owner to consider the loss and inconvenience which might result from keeping his property in his own hands preferable to the risk involved in placing it in the hands of a tenant. When therefore possession is obtained under a lease, the lessee is estopped from keeping the land in derogation of the agreement under which it was acquired." 2 Smith's Lead. Cas. (8th Am. ed.) 902.

[2] 3 Johns. (N. Y.) 471.

of the grantor to covenant that the lands were free from incumbrance. From precedents, and as no authority has been shown that the covenant for quiet enjoyment is broken by any other acts than an entry and eviction or a disturbance of a possession itself, we are of opinion that the demurrer is well taken."

This decision, however, is no longer recognized as authority in New York, or sustained by the weight of authority elsewhere. Thus in Sprague *v.* Baker,[1] where one who having received land with covenants for quiet enjoyment and of warranty paid the amount of a mortgage upon being threatened by the mortgagee to sue for possession of the premises under it, it was held that there was "nothing to distinguish this case from that of Hamilton *v.* Cutts[2] but a point of form which does not affect the merits of the question. The plaintiff has been disturbed in the enjoyment of his possession, and he has been compelled to purchase in another title for his own security, which we think very clearly has been a lawful interruption and a breach of the covenant for quiet enjoyment."

So in a more recent case in Pennsylvania, a mortgagor conveyed the premises bound by the mortgage, reserving to himself a ground-rent, and covenanting that the purchaser should at all times thereafter freely, peaceably, and quietly have, hold, and enjoy the premises, without any molestation, interruption, or eviction of the grantor or his heirs, or any one claiming under him or them, or by or with his or their acts, means, consent, or procurement. The purchaser sold to the plaintiffs, who upon the premises being advertised at sheriff's sale under proceedings on the mortgage purchased them and took a deed therefor,[3] and this was held a sufficient eviction to entitle the plaintiffs to recover.[4]

[1] 17 Mass. 590.

[2] 4 Mass. 350 ; *supra*, p. 175.

[3] It will be observed that the facts in this case were almost identical with those in Waldron *v.* McCarty, *supra*, p. 191.

[4] Brown *v.* Dickerson, 12 Pa. 372. "It is true," said Burnside, J., who delivered the opinion of the court, "that the covenant for quiet enjoyment goes more particularly to the possession than to the title. Hence, to have a breach of it, ordinarily, it is necessary to give evidence of an entry upon the grantee, or of expulsion from the premises, or some actual disturbance of the possession (2 Sugden on Vendors, 10th ed., 514–522), by reason of some adverse right existing at the making of the covenant, not of one subsequently acquired. Ellis *v.* Welch, 6 Mass. 246. Proof of the demand of possession on a superior right will not be deemed sufficient on which to found the action ; to maintain it, the plaintiff must exhibit an assertion and proceeding on that title, an ouster or disturbance by means of it ; but a technical ouster on a judgment at law is

So in Massachusetts, where the facts were similar, the court said, "The premises were offered for sale at public auction, and if the plaintiff had not become a purchaser he had a right to presume that he should be dispossessed by the purchaser, and he was justified in acting upon that presumption, and the defendant could not be thereby injured; for undoubtedly if the plaintiff had not become a purchaser, he would have been evicted if he had refused to yield possession, and in such case the defendant would be responsible for the costs of suit in the action against the plaintiff as well as for the value of the land, if duly notified of the pendency of the action."[1] The same doctrine has been recognized and applied in many other States, and is supported by the weight of both reason and authority.[2]

not absolutely necessary. 2 Greenl. Ev. § 243. Here, one of the plaintiffs was out of possession; and the other, in order to retain the possession, was forced to purchase at the sheriff's sale, and that to prevent such an ouster as would have kept him out forever. The rule as settled in Waldron *v.* McCarty, 3 Johns. 464, has not met the approbation of the profession in many States of this Union," and the more modern cases were then cited.

[1] Whitney *v.* Dinsmore, 6 Cush. (Mass.) 124. The early New York cases of Waldron *v.* McCarty, Kortz *v.* Carpenter, &c., were relied on by the defendant, but the court said: "However this may be, we consider the law well settled in this Commonwealth, and we see no reason for adopting the doctrine laid down in the cases cited from the New York reports. The question is whether in all cases a party must wait until he is actually evicted or ousted, before he can have the benefit of the covenant of warranty. We hold that there may be other acts of the party having a paramount title, which may be equivalent to an eviction. In the case of Duvall *v.* Craig, 2 Wheat. (S. C. U. S.) 45, it was held that if a grantee is unable to obtain possession in consequence of an existing possession or seisin by a person claiming or holding under an elder title, it is equivalent to an eviction. And so we think, if the grantee is in possession and a claim is made on him by a party having a title, against which he is unable to defend himself, he may yield to a dispossession or purchase in the paramount title; and the present case, we are of opinion, depends on a similar principle."

[2] Donnell *v.* Thompson, 1 Fairf. (Me.) 170; Kelly *v.* Low, 18 Me. 244; Cole *v.* Lee, 30 id. 392 (see this case noticed, *infra*); White *v.* Whitney, 3 Met. (Mass.) 81; Bemis *v.* Smith, 10 id. 194; Eastabrook *v.* Smith, 6 Gray, (Mass.) 572; Furnas *v.* Durgin, 119 Mass. 500; Stewart *v.* Drake, 4 Halst. (N. J.) 139; Haffey *v.* Birchetts, 11 Leigh, (Va.) 88; Dupuy *v.* Roebuck, 7 Ala. 488 (see this case noticed more particularly, *infra*); Gunter *v.* Williams, 40 id. 572; Lane *v.* Fury, 31 Ohio, 574; Tuite *v.* Miller (Ohio), 5 West. Law Journal, 413 (and see King *v.* Kerr, 5 Ohio, 154, whose decision, it was said in Johnson *v.* Nyce, 17 id. 69, *infra*, was controlled by the local "occupying claimant law"); Harding *v.* Larkin, 41 Ill. 422; McConnell *v.* Downs, 48 id. 271; Claycomb *v.* Munger, 51 id. 374; Crance *v.* Collerbaugh, 47 Ind. 256; Mooney *v.* Burchard, 84 id. 285; Nolan *v.* Feltman, 12 Bush, (Ky.) 119; Morgan *v.* Hannnibal R. R., 63 Mo. 129; Dyer *v.* Britton, 53 Miss. 270; McGary *v.* Hastings, 39 Cal. 360. The application of the principle stated in the text to the facts in the recent case of Lane *v.* Fury, *supra*, is noteworthy. The plaintiff below having been sued for the possession of certain lands by the heirs of her covenantor's grantor — a married woman, whose

In Mississippi, a stricter rule has long prevailed and it is there held that "in order to sustain an action on the covenant of gen-

deed was void for want of a proper acknowledgment — notified her covenantor to defend, and having obtained in a collateral proceeding a decree curing the defective acknowledgment and thereby barring a recovery by the heirs, brought suit on the covenant of warranty and recovered from her covenantor her expenses for attorney's fees, copies of records, and attending trials. Affirming this judgment, the Supreme Court said: "If the paramount title is so asserted that the grantee must yield to it or go out, he may purchase of the true owner, and this is an eviction which will constitute a breach of such covenant. Nor is it necessary that the paramount title be actually established by judgment or decree. What the law requires is that it be distinctly recognized. And what could be a more marked recognition of it than (the plaintiff below) made when she asserted it specifically, in legal form, in her petition to correct the defective acknowledgment? And if under the circumstances existing when the petition to reform was filed [she] might have bought in the paramount title and recovered from [her covenantor] any reasonable amount paid therefor, why may she not recover from him the costs and expenses, including counsel fees, in the two suits? Looking to the substance as well as the form of the transaction, it was a mode of getting in the legal title, and we can perceive no reason for a different rule in the latter case from that which prevails in the former. Such a course, moreover, will ordinarily be greatly to the advantage of the grantor; for the expense of correcting such a mistake will, as a general rule, be far less than the holder of the paramount title would demand, and far less than the damages the grantee would be required to pay when the grantee is turned out of possession. . . . If in holding that this petition is sufficient, we go somewhat further in sustaining such actions than this court has found it necessary heretofore to go, we are supported, nevertheless, by reason and authority."

In Leary *v.* Durham, 4 Ga. 593, after land had been conveyed with a general covenant of warranty, the widow of a former owner made application, under the local statutes, for an admeasurement and assignment of dower, upon which commissioners were regularly appointed and their return was made the judgment of the court, which directed a writ of possession to be issued upon application of the demandant. The plaintiff (the assignee of the covenantee) rested his case here, with proof that the injury to the land was four or five hundred dollars, and that his covenantor had notice of the pendency of these proceedings. On the trial, the court ordered a nonsuit, on the ground (among others) that there had been no eviction. But the judgment was reversed by the Supreme Court, on the ground that the tenant's surrender, though the record did not show that a writ of possession had ever issued, was justified by the judgment in the proceedings in dower, and that accordingly he was entitled to damages not merely nominal but such as a jury should assess for actual injuries incurred. It may, however, be doubted whether the judgment of nonsuit in this case was not properly entered. The plaintiff had not proved that he "*had* surrendered voluntarily," or that he *had paid* four or five hundred dollars (as in Donnell *v.* Thompson, 1 Fairf. (Me.) 170, and Tuite *v.* Miller, 5 West. Law Journal, 413; Davis *v.* Logan, 8 B. Mon. (Ky.) 342, was a suit in equity, where all the parties to the title being before the court, there was a general adjustment of title and settlement of damages): but merely that by the proceedings the market value of the land was diminished by that amount, so that upon a resale he would be obliged to discharge the incumbrance or have its price deducted from the purchase money. Until these events had actually happened, it would seem that he had no right to more than nominal damages; *infra*, Ch. IX. The case seemed to lean in favor of making the covenant of warranty as comprehensive as possible, and the course of decision in South Carolina, where an

eral warranty there must be either an actual eviction by judicial process, or a surrender of possession to a valid title asserted against the covenantee, or a holding of the grantee out of possession by such title so that he cannot enter." [1] The grantee who buys in the paramount title has, however, in that State an action of assumpsit for money paid to the use of his covenantor,[2] which serves the same purpose as an action on the covenant, and therefore the courts, though conceding the validity of the principle already stated, have not thought it necessary to adopt it.[3]

eviction is held unnecessary to a breach of this covenant, was cited with approbation. Indeed, the precise point decided in Leary *v.* Durham arose in a rather recent case in the latter State, where it was held that the mere assignment or assessment of dower constitutes a breach of the covenant of warranty. Lewis *v.* Lewis, 5 Rich. L. (S. C.) 12. But it will be remembered that in South Carolina the covenant of warranty is, in accordance with a long course of decisions there, treated as a covenant for seisin. See Mackey *v.* Collins, 2 Nott & McC. (S. C.) 186; and see also Williams *v.* Weatherbee, 1 Aik. (Verm.) 240.

The very recent case, however, of Amos *v.* Cosby, 74 Ga. 793, came more within the line of modern authority. The plaintiff having purchased from husband and wife a "homestead property" with covenants of warranty from both, afterward paid an incumbrance *under which a levy had been made*, and it was held that this was a constructive eviction.

[1] Dyer *v.* Britton, 53 Miss. 270. In this case the defendant having mortgaged the land to one Goff conveyed it with a covenant of warranty to the plaintiff's grantor. Goff filed a bill of foreclosure, and the decree under it ordered a sale unless the mortgage debt was paid. The plaintiff, who had purchased the land prior to the foreclosure proceedings, thereupon paid the debt and brought suit on the covenant. But the court held that though the covenant ran with the land, it had not been broken, and that the action would not lie. Such had been the decision more than thirty years before in Witty *v.* Hightower, 12 Sm. & Marsh. 478, where the facts were nearly the same; and afterwards in Burrus *v.* Wilkinson, 31 Miss. 537, the court had said, "Until the purchaser has yielded possession to the superior title and been dispossessed thereof, the contract of purchase must be considered as in existence, and any outstanding title acquired by him cannot amount to an eviction, but will be treated as a purchase of an outstanding title, which cannot be used in disparagement of the title derived from the original purchaser."

[2] Kirkpatrick *v.* Miller, 50 Miss. 521.

[3] "If the question were *res integra*," said the court in Dyer *v.* Britton, 53 Miss. 270, *supra*, "we should adopt the reasoning and conclusions of that line of decisions which have admitted constructive or equitable evictions as of equal import with an actual ouster in certain circumstances. We fully concede the force and justice of the argument that if the vendee in good faith pays off a foreclosure decree, which if executed would destroy his estate and evict him from the land, he should have indemnity by suit on the covenant of the warrantor. . . . If we did not have in our jurisprudence a principle which is equitable and just, we should not hesitate to overturn [former] decisions if they were the obstruction. But we have in the remedial machinery of our jurisprudence full practical and adequate remedy and redress for the covenantee to reimburse him for the outlays in extinguishing such incumbrances, or in getting in the adverse paramount title. He may recover the money back in the action of assumpsit, as in Kirkpatrick *v.* Miller, 50 Miss. 521, [*supra*,] or he may sue in chancery."

§ 144. There are some decisions which, at first sight, do not appear to be in accordance with the more modern doctrine, and some *dicta* which are not reconcilable to it, but it is believed to be supported by the weight of modern authority.[1]

[1] In Hannah *v.* Henderson, 4 Ind. 174, the facts were much the same as those in Waldron *v.* McCarty, *supra*, p. 191, and the court considered that "the mere existence of the better title could not have constituted an eviction of the plaintiff. If he had yielded to it by giving up possession, or bought it in and continued his possession under it, the action might have been sustained," but it was decided that "the mere payment of the judgment to avoid a sacrifice of the land on execution, and even a consequent eviction, will not authorize a suit against the grantor on the covenant." In Reasoner *v.* Edmundson, 5 Ind. 393, although the mortgage had been foreclosed, and the premises bought in by the mortgagee, yet no sheriff's deed had been made to him, and there was no evidence that the plaintiff had either yielded up the possession or purchased the mortgagee's title, and it was hence properly held that there had been no eviction. To the same effect is Mason *v.* Cooksey, 51 id. 519. In Hunt *v.* Amidon, 1 Hill, (N. Y.) 147, s. c. 4 id. 345, the defendant had, for the consideration of $1,200, sold to the plaintiff's grantor, with a covenant of warranty, premises which were then incumbered by a mortgage, under foreclosure of which the premises were afterwards sold and bought for $ 470 by the plaintiff, who then brought an action of assumpsit for money paid to the vendor's use, and recovered judgment, which was affirmed on error and is in harmony with the more recent case of Cowdrey *v.* Coit, 44 N. Y. 382, and with the main current of decision. But Walworth, Ch., delivering the opinion of the court above, said *obiter*: "It is at least doubtful whether an action at law could have been sustained upon this covenant for quiet enjoyment without showing an actual eviction. And I admit that under such a covenant the grantee of the land has no right to give it up voluntarily to a stranger who claims by title paramount, or even to pay off an alleged incumbrance without suit, and then resort to his action upon the covenant in the deed." The remark that the grantee has no right to give up *voluntarily* to a stranger who claims by title paramount, is entirely justified by the authorities (see *infra*); and the expression, "or even to pay off an alleged incumbrance *without suit*," must, it is apprehended, be referred to the same meaning; for it is generally held that although it is absolutely necessary that the adverse claim should be hostilely asserted, yet that it is not necessary that the assertion should be made by a judgment, or even a suit, any more than it is necessary that an eviction, when actual, should be under legal process, and the effect of a judgment, a decree, or a suit is in this relation no more than an unequivocal assertion of the right by the paramount claimant (see *infra*). The inaccuracy of this *dictum* is noticed by Edmonds, J., in Fowler *v.* Poling, 6 Barb. (N. Y.) 168, who after a rapid review of the cases reaches this conclusion: "From these conflicting authorities I deduce the true rule in this State to be that there must be an actual disturbance of the possession, and that where the covenantee is actually out of possession, either by due process of law, or by an entry of the rightful owner, or by a surrender to one having the paramount title, there is an eviction; the covenant is broken and an action will lie." In this case, the purchaser had, at the instance and request of his vendor, instituted proceedings in partition between himself and the holders of the paramount title (the latter having a title to an undivided part of the land), and had their share set off to them in severalty and surrendered possession to them. Under these circumstances, it was obviously held that there was an eviction *pro tanto*, and the remarks as to the purchaser being "actually out of possession," would seem not to be necessary to the decision. In the

§ 145. It may perhaps be said that there should be a distinction taken between a *lease* and a *purchase* of the paramount title by the covenantee, inasmuch as in case of a lease it is, in legal construction, the holder of the paramount title who is in possession, the possession of the tenant being that of the landlord, while in case of a purchase the possession remains in the covenantee. To this it may be answered, that although in the latter case the covenantee in reality remains in possession, yet he is supposed to have been actually ousted, whereby all connection with his former title is dissolved, and then to have been reinstated under the paramount title.[1]

§ 146. In all the foregoing cases the purchase of the paramount title had been made after the establishment of the latter by a judgment or decree. But as it has already been seen that the authorities as to *ouster in pais* draw no distinction, save as to burden of proof, etc., between cases where the title has or has not been thus first established, so it will be found that no such distinction is taken as to constructive eviction;[2] and it is now held

later case of Bordewell *v.* Colie, 1 Lans. (N. Y.) 146, the decisions in Massachusetts were cited with approbation. In Pennsylvania, after some diversity of decision (Paul *v.* Witman, 3 Watts & Serg. 407; Poyntell *v.* Spencer, 6 Pa. 257; Knepper *v.* Kuntz, 58 id. 480), the law has been settled in accordance with modern authority. Brown *v.* Dickerson, 12 Pa. 372, *supra*, p. 192.

[1] Poyntell *v.* Spencer, 6 Pa. 257. It seems hardly necessary to remark that in every case in which an eviction would be held to be caused by the purchase of the paramount title, the damages would be measured by the amount which had been fairly and *bona fide* paid for this purpose, and could never exceed that sum.

[2] That is to say, no distinction is made as to a yielding up of the possession when the paramount title has, or when it has not, been established by a judgment or decree, it being sufficient that its holder has either the right to obtain possession himself, or to deprive the purchaser of it; the only difference being that when there is no such judgment the covenantee retires at his peril, with the burden of proving that the adverse title was one to which he would have been compelled to yield. Where there is a judgment it is held by some authorities to be *prima facie* evidence, and when the covenantor has proper notice of the action it is conclusive evidence of the better title. To the objection that the absence of a judgment leaves open the door to fraud, it may be replied that a judgment is so far from being an insuperable barrier to fraud as often to prove the most convenient and insidious means for its introduction, — a fact well recognized as having an important influence on the finality of a judgment. Obviously, on the presentation of a *prima facie* and undisputed right a court must give judgment without further scrutiny of the case, but it may always be impeached for fraud; Wilson *v.* McElwee, 1 Strob. (S. C.) 66; and this alone prevents it from becoming in general an intolerable instrument for fraudulent purposes. The advantage to be obtained, however, from a collusive judgment in an action on the covenant of warranty can always be counteracted. The object of the covenantee in suffering such a judgment is to enable himself to buy in the paramount title at a low price, and then recover from the covenantor

that a purchase by a covenantee of an outstanding paramount title, when that title is actually and hostilely asserted, will constitute such an eviction as will entitle him to damages upon his covenants for quiet enjoyment or of warranty, measured by the amount he has thus paid.

Thus in a case in New Hampshire, the plaintiff, in his action on the covenant of warranty, proved a prior conveyance by his covenantor of part of the premises to other parties. The land was wild and without actual possession. Upon the death of one of the prior grantees, his interest in the land was sold by his administrator at public sale and purchased by the plaintiff, and it was held that these facts constituted an eviction.[1] So in a later

the full consideration paid for the premises. But by limiting the damages, as is done in the case of the covenant against incumbrances, to the actual amount thus paid, every temptation to fraud is precluded, and the covenantor is always allowed, in mitigation of damages, to give evidence of what the plaintiff has paid to buy in the outstanding title. Tufts *v.* Adams, 8 Pick. (Mass.) 550; Cole *v.* Lee, 30 Me. 392. And if the amount which he has thus paid be a nominal one, his damages will be nominal also. Leffingwell *v.* Elliot, 8 Pick. 457; s. c. 10 id. 204; Loomis *v.* Bedel, 11 N. H. 87. There are *dicta* to a contrary effect in Martin *v.* Atkinson, 7 Ga. 237. Even where there is no pretence of fraud or collusion, there seems but a single case in which, in the action on the covenant, the whole question of title cannot be gone into, and that is where the party bound by the covenant refuses, upon proper notice, to come in and defend. Having thus, by his own *laches*, lost the advantage of trying the question of title then, he must suffer for his neglect afterward; and even under these circumstances the plaintiff is obliged to prove that the adverse title is not one derived from himself.

[1] Loomis *v.* Bedel, 11 N. H. 74. "If the claimant holding the paramount title should enter upon the land, and the grantee should thereupon yield up the possession, he would immediately have a right of action upon the covenant of warranty in his deed; and this right would not be barred or forfeited should he forthwith purchase the premises from the claimant, to whose superior title he had thus yielded the possession. He might, on such purchase, immediately re-enter into the possession, and still maintain his action on the covenant. If, instead of this formality, he yields to the claims of a paramount title, and purchases without any actual entry of the claimant under it, where is the substantial difference? For all practical purposes, his title under the grant to which the covenant is attached, and under which he originally entered, is as much defeated in the one case as in the other. He is, in fact, dispossessed, so far as that title is concerned. He is still in possession, but he is so under another title, adverse and paramount to his former one; and his purchase is, therefore, equivalent to an entry of the claimant. It is an ouster by his consent, and a re-entry by himself, under the superior title, without going through with what would be at best a mere formality, where, conscious of the defect of the title under which he originally entered, he chooses to yield peaceably to the assertion of a better title and to purchase it. The grantor who conveys a defective title, with a covenant of warranty, has no reason to complain of this. No action can be maintained against him upon his covenant in such case except upon proof of the actual existence of a title superior to the one he conveyed, and which his grantee could not withstand at law; and if that proof

case in Vermont, the purchaser, having been sued by the holder of the paramount title, bought in that title before final judgment and in order to prevent being dispossessed of the land, and it was held that this was an eviction;[1] and the weight of modern authority is to the same effect.[2]

§ 147. There are a few cases whose language might admit of misconstruction, and which, therefore, it seems proper to notice here. Thus in a case in Kentucky, it was broadly said, "It could not be disputed that if a vendee, before eviction, purchase in an outstanding paramount title, he cannot continue in possession under his first purchase, and claim damages as for a breach of warranty, on account of the title he has acquired."[3] In a previous

is made out, with evidence that the title was asserted and yielded to, why should he be permitted to insist there must be a formal surrender of the possession, or actual entry, and that if this was not done there could be no breach of his covenant? How would his interests be benefited by the going out and going back again? The ouster, so far as holding under his title is concerned, is as effectual by a purchase without actually leaving the premises as it could be by peaceably leaving them, or even by an expulsion through the operation of legal process. Sprague *v.* Baker, 17 Mass. 590." The judgment below in this case was, however, properly set aside on the ground of the measure of damages, the court saying that there was no evidence of the amount which had been paid by the plaintiff for the purchase of the property, and that his damages must be measured by that amount unless it exceed the value of the land.

[1] Turner *v.* Goodrich, 3 Deane, (Verm.) 709. "We have now the case," said Redfield, C. J., who delivered the opinion, "of a suit brought by one having an elder and better title, and before final judgment the covenantee, to prevent being dispossessed of the land, purchases in the title at a fair rate. This, no doubt, in justice and moral equity, is the same thing as eviction. When he is in possession of the land, and the suit is brought, or the title asserted in any way, perhaps, whereby it becomes impossible for the covenantee longer to maintain his possession, it is the same thing whether he yields without suit or after judgment to a writ of seisin and possession, or buys in the outstanding title at a fair rate. Of course, if he yields to a claim of title without suit or without judgment or notice to the covenantor to defend his title, he assumes the burden of showing the title to which he yields good, and so also if he purchases in the outstanding title; and in either case he must rebut all possible implication of collusion. But this is matter of evidence, and when established it should, and as we regard the recent decisions does, constitute a breach of the covenants of warranty, and entitles the party to recover the amount paid to obtain the title, and all expenses necessary in the premises, which must extend to the costs of the suit, while pending, and counsel fees. Pitkins *v.* Leavitt, 13 Verm. 379."

[2] Amos *v.* Cosby, 74 Ga. 793; Royer *v.* Foster, 62 Io. 191; Walker *v.* Deane, 79 Mo. 664; Kramer *v.* Carter, 136 Mass. 504; Clark *v.* Munford, 62 Tex. 531.

[3] Vanmetre *v.* Griffith, 4 Dana, (Ky.) 92. This case was, however, correctly decided. One who had received land with covenant of warranty contracted with the paramount owner to buy in his title, in case it should prove, on legal investigation, to be the better one. Suit was brought against the covenantee, and notice given to the covenantor. Judgment was entered in favor of the paramount title by confession, and on a writ of possession the sheriff indorsed that he had delivered the

case[1] it had been laid down by the court that "if a vendee acquire a paramount title under such circumstances, the most he can do in equity is to show the advances made, and claim to be considered as the agent and trustee of the vendor in acquiring the adverse title, or (if the vendor refuse so to consider him) to surrender the possession acquired from him and use the newly purchased title in warfare. He cannot continue in possession, and set up the new title in hostility to the old" But this language proceeds upon a misapplication of the familiar principle in equity that if a mortgagee, executor, trustee, tenant for life, etc., *who have a limited interest* get an advantage by being in possession, or "behind the back" of the party interested in the subject matter, he shall not retain it for his own benefit but hold it in trust.[2] This, however, it is believed, was never applied to the case of a purchaser, with reference to his remedy on the covenants for title, as he can have no interest in setting up or procuring an adverse title except for the simple purpose of his own protection, and this protection the vendor has expressly covenanted to afford. The mistake has arisen from forgetting that the measure of damages is *not*, in such cases of purchase, the consideration money and interest (which would open every door to fraud), but simply the amount which has been paid to purchase the paramount title.[3]

possession to the plaintiff's agent who then delivered it to the covenantee, and the latter then sued the representatives of his covenantor, who had died in the mean time, and judgment was confessed for the amount of the original purchase money with interest. For part of this judgment one of the administrators gave his own note and paid the balance, and then upon discovering the contract which had been made between the covenantee and the paramount owner and that the amount paid by the former for the paramount title *was less than the judgment which he had recovered against the estate of the covenantor*, filed a bill to restrain the collection of the balance of the judgment, and to refund the excess over the amount thus paid by the covenantee. The Chancellor under these circumstances most properly decreed for the complainant, and the Court of Appeals affirmed the decree.

[1] Morgan *v.* Boone, 4 T. B. Mon. (Ky.) 297.

[2] Nesbitt *v.* Tredennick, 1 Ball & Beatty, (Irish Ch.) 46; Holeridge *v.* Gillespie, 2 Johns. Ch. (N. Y.) 33; Burhans *v.* Van Zandt, 7 Barb. S. C. (N. Y.) 102.

[3] Indeed, the cases of Venable *v.* Beauchamp, 3 Dana, (Ky.) 323, and Coleman *v.* Coleman, id. 403, decided no more than that one tenant in common could not, before eviction, purchase in an outstanding title to the prejudice of his co-tenant, but that the purchase must enure jointly to both. The case of Woodward *v.* Allan, 3 Dana, (Ky.) 164, though perhaps more properly classified under the preceding head, may be referred to as showing that the law in Kentucky is in harmony with the more modern authorities elsewhere. There was an express covenant for return of the consideration money if the land should be lost. "If it be admitted," said Robertson, C. J., "that a covenant to be responsible if the land is lost is tantamount to a covenant of general warranty, and that, therefore, an eviction would be indis-

§ 148. It may also be observed that cases sometimes occur where courts of equity have brought before them the whole question of title and all the parties are before the court. This perhaps most frequently happens in the marshalling or administration

pensable to the plaintiff's right to maintain this action, still we are clearly of the opinion that he proved on the trial every fact that was necessary to entitle him to a judgment. He exhibited a judgment of eviction in an action of ejectment, and proved that the defendant as well as himself was a party to the ejectment, that the judgment was for the land embraced by the covenant, and that he had, after the judgment, surrendered to one of the lessors and leased the land of him."

In Johnson *v.* Nyce, 17 Ohio, 66, the declaration averred a right of dower in the widow of a prior owner of the property, and upon her petition for dower being filed, the covenantee took defence, "and such proceedings were had therein, that afterwards, in November term, dower in all of said lands and premises was duly assigned and confirmed unto the said J. M. at the gross sum of $137.50, which the plaintiff was thereby ordered to pay to the said J. M., in full for her dower, etc., in sixty days after said November term ; and, in default thereof, that execution issue as upon judgments at law, by means whereof the plaintiff has paid and been liable to pay a large sum of money," etc. On demurrer, it was held that this was no eviction. "We do not doubt," said Hitchcock, J., "that the covenant in the deed is sufficient to cover a claim for dower, provided the same be prosecuted to such a result that the covenantee is thereby deprived of even the temporary possession of the whole or any part of the land conveyed. It may be thought that a covenant against incumbrances is the appropriate covenant to meet such a case, but it is equally well met by the covenant of warranty. In order, however, to maintain an action upon the latter covenant, there must, as a general rule, have been an eviction, and this fact should appear from the declaration." The case of Tuite *v.* Miller, 5 West. Law Journal, 413 (not Tuite *v.* Miller, 10 Ohio, 383), was then mentioned and approved. In that case, one third of the rents and profits of the land had been set off to the widow for her dower, and made a charge upon it, and it was ordered that, unless payment was made, the land should be sold. This was held equivalent to an eviction, as it was also in the more recent case of McAlpin *v.* Woodruff, 11 Ohio, 128. But it was said in Johnson *v.* Nyce, that in the case then before the court there had been no assignment of dower by metes and bounds, nor according to the local statute of one third of the rents. "The statute seems to have been entirely disregarded. True, a decree was made in the widow's favor against the plaintiff for $137.50, which was to be in full of dower. This, however, was not made a charge upon the land, and could in no shape act as an incumbrance upon it. It was a mere personal debt, to be enforced by execution. . . . It had no operation to incumber the land. Had the one third part of the land been set off by metes and bounds, and the widow put in possession, or had dower been assigned according to the statute, as in Tuite *v.* Miller, then the plaintiff might have had redress on the covenant of warranty. But, as the case is now presented, he can have no such redress." This case should be read in connection with the one next reported, viz. Nyce *v.* Obertz, 17 Ohio, 71. The circumstances were the same as in the previous case, except that the covenant sued upon was that against incumbrances, which was held not to be broken. See *supra*. It is evident, from an examination of these two authorities, that they were decided under special circumstances. The Supreme Court seem to have determined, owing to the apparent disregard of the provisions of the local statute as to dower by the court which had pronounced the decree, that no recovery should be had under these circumstances upon any of the covenants for title. With this end, the case of Nyce *v.* Obertz, went very far.

of assets, some of the instances of which will be hereafter referred to.[1] In these cases, where an equitable adjustment of all conflicting claims can be made and compensation awarded, either by reference to a master, or if necessary, by issues of *quantum damnificatus*, the rule as to eviction is more relaxed, and it seems not necessary that even a payment to purchase the better title should have been made; but the paramount *right* having been established, the amount of damages is equitably adjusted without making this essential.[2] Such cases however, it must be observed, are exceptional and occur perhaps only when all the parties to the title are before the court and their respective rights are capable of equitable adjustment.

§ 149. But it may be asked, what then is the practical distinction between a covenant of warranty and a covenant for seisin or against incumbrances?

The answer to this is that the latter covenants assure *the title*, and the purchase of the adverse claim has nothing to do with their *breach*, however it may affect the measure of the damages. If the title be defective or if an incumbrance exist, the purchaser has a right of action which, as such, is not affected either beneficially or injuriously by the purchase of the paramount claim. Such a purchase merely affects the question of damages. And, moreover, the question whether the claim is or is not asserted, and if asserted to what extent, has nothing to do with the right of action — it is sufficient that such claim exists.

§ 150. But under the covenant of warranty, as usually expressed, it must not be supposed that a purchaser can, as a general rule, buy in any paramount claim, and elect to consider himself evicted to the extent of the purchase money of such claim. However far the doctrine of constructive eviction has been carried, it is believed to be still absolutely necessary that the adverse claim *should have been hostilely asserted*. It is not necessary that the assertion should be made by a judgment or even a suit, any more than it is necessary that an eviction, when actual, should be under legal process.[3] The effect of a judgment, a decree, or a suit is, in this relation, no more than an unequivocal assertion of the right by the paramount claimant. According, therefore, to the weight of authority at the present day, the dis-

[1] See *infra*, Ch. XV.

[2] See *infra*, Ch. IX. and XIV.

[3] See *supra*, p. 132.

tinction is not whether there has or has not been a judgment in favor of the paramount claim, but whether such claim has or has not been adversarily asserted.[1]

This is well illustrated by a case in Pennsylvania, where a covenantor having neglected to pay the purchase money due to the Commonwealth, it was voluntarily and without claim being made by the latter paid by the covenantee, who it was held was not under these circumstances entitled to recover upon his covenant of warranty, as the possession had never been disturbed or threatened.[2] So in a later case, the same court held that "until an

[1] The difference thus sketched between these covenants was approved in the late case of Funk *v.* Creswell, 5 Clarke, (Io.) 89. "It will be found upon examination," said the court in Morgan *v.* Henderson, 2 Wash. Terr. 367, "that the most advanced of these cases have gone no further than to hold that a covenantee may yield to a paramount title hostilely asserted against the title conveyed to him by his grantor, and then avail himself of such a disposition as a breach of the covenant in question and may maintain an action thereon for such breach; though of course by thus yielding, he places upon himself the burden of proving in such action that the title to which he has thus yielded is in fact a title paramount. And in our opinion the great weight of authority, both ancient and modern, is to the effect that this covenant is never broken until there has been some hostile assertion of a better title."

[2] Patton *v.* McFarlane, 3 Pa. (old Pa., not Pa. St.) 419. "If a recovery in this case upon the covenant of general warranty," said Kennedy, J., who delivered the opinion of the court, "can be supported without either allegation or proof of an eviction, it would in effect be deciding that the covenant of general warranty contains within it each of these five covenants for title, which would be a novel idea to conveyancers and professional men. . . . It was the inaptitude of the covenant of general warranty to accommodate itself to the various intentions of the parties, as well as the circumstances connected with the titles to the land, that first gave rise to these special covenants and recommended them to general use, which repudiates the idea of their being contained within it. . . . Although the Commonwealth had a claim against the land in the case under consideration, yet she had taken no step whatever, after the conveyance of it to McFarlane, to enforce the payment of the money. Whether she would have done so was uncertain, and Patton had a right under his covenant of warranty with McFarlane to avail himself of all the indulgence that might be given by delay on the part of the Commonwealth to proceed against the land, to have the money collected by a sale of it. Although it may be considered certain that the payment of the money would have been compelled some day or other, yet it might make some difference to Patton whether he was to be called upon immediately at the will of McFarlane for payment, or to have it postponed to a distant day by forbearance on the part of the Commonwealth to proceed to collect it." So far, however, as this case approved Waldron *v.* McCarty, 3 Johns. (N. Y.) 417, it should be observed that that case has been since distinctly overruled in Pennsylvania (Brown *v.* Dickerson, 12 Pa. 372), as well as elsewhere (see *supra*, p. 193, n. 1), and would not be recognized as law at the present day in New York. Hunt *v.* Amidon, 4 Hill, 349; Fowler *v.* Poling, 6 Barb. S. C. 168. So in a case in Missouri, Shelton *v.* Pease, 10 Mo. 482, it was said: "The covenant declared on is to warrant and defend the title and possession against all liens, and especially against the incumbrance specified in the deed. There is no

eviction of the grantee, or a demand made of the land from him by one having a better title for it, the covenant of warranty could not be said to be broken;[1] and more recently, that "there must be proof at least of an involuntary loss of possession."[2] So in a

covenant that the grantor will pay off the mortgage, nor is any such covenant implied by the covenant of general warranty. Nor is the payment of the mortgage by the grantee any breach of the covenant of general warranty or of the covenant of quiet enjoyment. It seems to be well settled that a disturbance of the possession is necessary to constitute a breach of these covenants. Among the numerous cases which are to be met with on this subject, both in the United States and in England, I have met with none in which a mere payment of money for the purpose of buying in a paramount title or extinguishing a mortgage has been held to be a breach of the covenant of warranty."

[1] Dickinson *v.* Voorhees, 7 Watts & Serg. (Pa.) 357.

[2] Dobbins *v.* Brown, 12 Pa. 79; see this case noticed *infra*, § 152, p. 208. In Knepper *v.* Kurtz, 58 id. 482, real estate was devised to the testator's son, charged with the payment of certain legacies, and the devisee conveyed to the defendant, who agreed to convey the land to the plaintiff clear of all incumbrance, and afterwards delivered a deed to the latter containing a covenant of general warranty. The plaintiff, on discovering the existence of the legacies, notified the defendant to discharge the same, and afterwards the plaintiff paid them himself and brought this action to recover the amount. The court below, whose opinion was affirmed in error, thus stated the law, in conformity with the text: "Outside of the legal profession, the covenant of warranty is regarded a panacea for every defect that can be alleged against the title of the grantor, and scriveners, especially in the rural districts, rarely think of the necessity for any other. It was, doubtless, supposed in this, that the insertion of the covenant in the deed fully met the requirements of the articles of agreement providing that the land should be conveyed clear of incumbrances. There is, however, a very broad distinction between a covenant of general warranty and a covenant against incumbrances. In the latter, where incumbrances exist, the covenant is broken as soon as entered into, while in the former the covenant is broken only by an eviction. In order to give the covenantee a remedy against his warrantor, he must allege and prove an eviction, either actual or constructive. The eviction is actual when the covenantee is dispossessed of the land, or when a judgment at law is rendered, which may result in actual dispossession; and it is constructive where the covenantee, by reason of the paramount title, has never been able to obtain the possession; or when, after the adverse title has been established, the covenantee has either purchased or taken a lease under such title, without any actual change of possession; or where he has purchased or taken a lease, the adverse title not having been established. These instances of constructive eviction relate more particularly to cases where there is an outstanding paramount title, and not to cases in which the party may be dispossessed by the enforcement of a lien existing against the land conveyed. In the case at bar there was no eviction, in the legal sense of that term, either actual or constructive, which could give to the covenantee the right to commence his action on the covenant of warranty. To allow him to do so would be to abolish the practical distinction between the covenant of warranty and the covenant against incumbrances. If suits had been brought by the legatees, and the warrantor had been notified to defend, a judgment thereon rendered against the plaintiffs would, on payment thereof, have placed them in a position to maintain this action, as the law would not require them to submit to the ceremony of an actual dispossession; but having paid the legatees voluntarily and without suit, when it is possible, if an opportunity had been offered, the covenantor might have been able to show that

case in New York, certain land of which a part had been returned to the comptroller and sold by him for unpaid taxes was subsequently conveyed with a covenant for quiet enjoyment to a purchaser, who on the last day for the redemption of the land paid the amount of taxes, with charges, etc., and thereby redeemed it, and then brought suit on his covenant; but it was held by the court below that the action could not be maintained, there having been no payment of money at the request of the defendant and no eviction, and this ruling was sustained by the Supreme Court, which held that as there was no covenant against incumbrances, the plaintiff had no right to pay voluntarily and without any request on the part of the defendant and then charge him with such payment;[1] and such is the unquestioned current of authority.[2]

§ 151. A different rule might, however, apply in the case of a covenant for quiet enjoyment when expressed as is usual in English conveyances,[3] and in a recent case in Maine it has been held

the incumbrances were discharged, they are within the rule established in Patton *v.* McFarlane, *supra*. Notice to the covenantor to pay and discharge the legacies is no evidence of an eviction, as insisted upon by the plaintiffs. Had a suit been threatened, and the plaintiffs were likely to be disturbed in their possession, there would be more plausibility in the position; but even then the weight of the authorities would require us to hold there was no eviction."

[1] McCoy *v.* Lord, 19 Barb. S. C. (N. Y.) 18. "Upon principle," said Greene, J., who delivered the opinion, "this seems a very clear case. The plaintiffs purchased a piece of land of the defendant, and in the conveyance which they took provided for their own security by such a covenant as they thought proper to exact and the defendant was willing to execute. The rights of the parties under that covenant are well settled and understood and there is no pretence that it has been broken. But it is supposed that there is something in the peculiar circumstances of this case from which the plaintiffs derived a right to pay the money in question, and charge the defendant with it in this action. . . . The plaintiffs' covenant for quiet enjoyment has never been broken, for the reason that there never was any eviction. They were not compelled by legal process to pay. And as they had no covenant against incumbrances, they had no right to pay them voluntarily and without any request on the part of the defendant, and charge him with such payment. It is no answer to say that it would be a hardship for the plaintiffs to be compelled to wait until they were evicted, and then sue for the purchase money and lose the enhanced value of the land and improvements. But for the covenant for quiet enjoyment they could not even recover the purchase money in a case free from fraud; and if they desired a remedy adequate to other contingencies, they should have provided for it by appropriate covenants. These covenants have been long in use, and the rights and remedies of parties under them have been long and well settled; and it is a sufficient answer to this action, under such circumstances, that there is no precedent for it."

[2] Wilson *v.* Irish, 62 Io. 260; Snyder *v.* Jennings, 15 Neb. 372; Morgan *v.* Henderson, 2 Wash. Ter. 367.

[3] That is to say, that the purchaser shall enjoy without any let, suit, etc., *and*

that where the covenant was one of non-claim,[1] "the purchaser was not bound to wait until such measures were taken to deprive him of possession when his remedy against the defendant might be fruitless."[2] So where in Iowa, there is a statutory form of a covenant of warranty which is considered "to include and imply every lesser covenant for title," it was held that where a grantor refused to pay off a tax which was a lien upon the land conveyed, his grantee might pay the same and recover the amount so paid in an action on the covenant.[3] It would of course be otherwise if the tax sale were illegal; its payment by the grantee would be merely voluntary and could not make the tax a valid incumbrance.[4]

§ 152. In the preceding classes of cases which it has thus been attempted to consider, the loss for which the benefit of the covenant was invoked has been that of the land itself or of some corporeal right incident to its enjoyment. But in case the subject of the loss has been an incorporeal right annexed or incident to the land, or something which represented or stood in the place of the land, while there are decisions which hold that these also, equally with the land itself, may come within the scope of a covenant of warranty,[5] there have been at least two decisions to the effect that such a loss is not within its scope.

that free from all incumbrances, etc., *supra*, § 70, *et seq.* Such was the form of the covenant in Hall *v.* Dean, 13 Johns. (N. Y.) 105, where it was held that the purchaser was entitled to recover the amount he had voluntarily paid to extinguish the incumbrance.

[1] See *supra*, § 22.

[2] Cole *v.* Lee, 30 Me. 392. "But," continued the court, "as under a deed containing the common covenant of warranty against incumbrances, he, as grantee, might remove them, and resort to the covenant of his warrantor in an action for indemnification." If "the common covenant" here referred to be the ordinary covenant of warranty as thus expressed, then these remarks are apparently inconsistent with the course of decision in Pennsylvania and New York noticed in the text. But if the covenant be indeed a warranty *against incumbrances*, the case would, it is apprehended, fall within the distinction noticed *supra*, p. 205, n. 3. The case itself was simply one of a mortgage given by the defendant to one Nickerson, and a subsequent mortgage by the former to the plaintiff with a covenant of warranty, which latter mortgage was afterwards extinguished by a quitclaim deed from the defendant to the plaintiff, containing the covenant that neither he nor his heirs nor any one claiming under him or them should, by any way or means, claim or demand any right or title to the premises. The plaintiff bought in the Nickerson mortgage and took an assignment of it, and it was held, in a suit upon the covenant, that he was entitled to recover the amount paid by him.

[3] Funk *v.* Creswell, 5 Clarke, (Io.) 91; Thomas *v.* Stickle, 32 id. 71; Richards *v.* Iowa Co., 44 id. 304; Rev. St. 1884, p. 533, § 1970.

[4] Cummings *v.* Holt, 56 Verm. 384.

[5] Kramer *v.* Carter, 136 Mass. 504; Scriver *v.* Smith, 100 N. Y. 471, where

In Mitchell *v.* Warner,[1] decided in Connecticut in 1825, a tract of land through which ran a stream of water was conveyed to a purchaser with a covenant of warranty, and the water having been, under paramount title, diverted from the land, it was held that the covenant was not broken, either by the existence of the paramount right or by the actual entry and diversion of the water in pursuance of it.[2]

the subject was elaborately considered, and the previous cases of Green *v.* Collins, 86 N. Y. 246, and Adams *v.* Conover, 87 id. 422, explained. See *infra*, p. 215, n. 3.

[1] 5 Conn. 497.

[2] It may be, however, observed of this decision that although authorities were cited to show that at common law, warranty extended to rents, commons, "and all things issuing out of the land," and to incorporeal hereditaments, yet the court proceeded upon the distinction that these authorities could not have meant to include incorporeal hereditaments which were not *tenements*, and it was said that water and a right to draw water were indeed incorporeal hereditaments, but not tenements, as not being of a permanent nature. Such a distinction was not, however, taken in the authorities thus cited (Co. Litt. 46, 48, 388, 389; Touchstone, 184; 2 Black. Com. 18; Pomfret *v.* Ricroft, 1 Saund. 322; Bally *v.* Wells, 3 Wils. 26); and seems open to much objection, for it is elementary law that "if a man grants all his lands, he grants thereby all his mines of metals and other fossils, his woods, *his waters*, and his houses, as well as his fields and meadows, and by the name of land, which is *nomen generalissimum*, everything terrestrial shall pass;" 2 Black. Com. 18; and it would seem natural to suppose that when a warranty accompanied such a grant, its scope was coextensive with the subject matter. Hence in Pennsylvania, a covenant for quiet enjoyment in the lease of a furnace and grist-mill has been held to be broken by the diversion, under paramount right, of the water of the stream. Peters *v.* Grubb, 21 Pa. 455, and a recent Nova Scotia case is to the same effect, Parker *v.* Fairbanks, 1 Russ. & Ches. 285. So where the plaintiff, in an action on his grantor's covenant of warranty, offered to prove that at the date of the deed there had been a house on the premises which had been since removed by a former tenant, under a prior agreement between him and the grantor, by which the former was to be at liberty to remove the building whenever his term expired, it was considered that the mere statement of the case was the strongest argument that the removal was a breach of the covenant. "What," it was said, "is a more thorough eviction than the absolute removal or destruction of the property conveyed, if the act is done in pursuance of a title superior to that of the grantor at the date of the deed? and what would constitute a more complete breach of the covenant against the grantor and his heirs than the removal of the house by a title derived from him, anterior to his deed to the plaintiff?" West *v.* Stewart, 7 Pa. 123, and see *supra*, p. 73, n. 8. And very recently in the same State the case of Mitchell *v.* Warner has been pronounced to be "an ill-considered case, and opposed to the teachings of all the elementary writers on common law." Wilson *v.* Cochran, 46 Pa. 233. It was likewise decided in Wheelock *v.* Thayer, 15 Pick. (Mass.) 70, that the benefit of a covenant of warranty contained in a grant of a right of drawing water from a pond would not enure to a subsequent purchaser of this right, "as it could not run with the land, as no land was granted, and to make a covenant run with the land it is not sufficient that it is of and concerning land." Such a distinction is very technical, and unsupported by authority, and this case and that of Mitchell *v.* Warner have been questioned in the note to Spencer's case, 1 Smith's Leading Cases (8th Amer. ed.). The subsequent case in Connecticut of

In Dobbins *v.* Brown,[1] decided in Pennsylvania in 1849, the defendant, being the owner of certain lots, executed a deed by which in consideration of the benefit to be derived to him from the opening of the Pennsylvania Canal through them he agreed that the agents of the Commonwealth might enter upon, occupy, and keep so much of them as should be necessary for a canal, and released all claims for damages for land so taken. Ten years afterwards, he sold these lots to the plaintiffs with a general covenant of warranty, and in the following year the canal was, by authority of the Commonwealth and notwithstanding the plaintiff's resistance, laid out and constructed across the lots, occupying nearly one third of their surface, whereupon the plaintiffs brought suit on the covenant and at the trial obtained, under the charge of the court below, a verdict for about one third of the consideration money.[2] But the judgment was reversed by the Supreme Court, on the ground first, that a covenant of warranty does not extend to an entry by the Commonwealth in the exercise of her right of eminent domain; secondly, that there had been no eviction of the land but at most an interruption of the enjoyment

Griswold *v.* Allen, 22 Conn. 89, was decided merely on the ground that the grant was of a limited privilege, and the covenant coextensive with the grant.

[1] 12 Pa. 75.

[2] The charge of the court as to the right to recover was as follows: "The alleged breach of warranty is the eviction by the Commonwealth under a prior authority or license given by defendant. This eviction, it seems, is but a partial one in point of fact thus far. Was the eviction to the prejudice of plaintiffs, and one warranted against by defendant? Certainly, but not absolutely and without qualification. It is true the Commonwealth has the right, exercised under certain conditions, provided for in the Constitution (§ 10, Bill of Rights); for without it makes just compensation it is not easy to find in it even any other rights than has any private citizen, except it be that it may exercise the right and then make compensation, whereas a private citizen must precede it with the compensation and consent of the owner. The consent may be already considered as given to the Commonwealth by every citizen owning property, yet it must be understood upon the express stipulations of the Constitution. That right itself may be considered inherent in the government; so is the right to compensation in the citizen. This general warranty in the deed is not broken by the mere exercise of this right on the part of the Commonwealth. But then this right of the citizen to require damages or compensation therefor is so complete and extensive that it cannot be abridged by statute. The right is reserved to the citizen by the Constitution, and there is no legislative authority to take it away or diminish it. This right, then, is warranted to plaintiffs by this deed. And if this right was released or conveyed, and so destroyed by the warrantor prior to his warranty to plaintiffs, it is very clear that, upon the eviction under it, the covenant is broken, and the warrantee or covenantee is entitled to recover from his warrantor. This is most certainly right and just and nothing more. Upon this principle we charge you the plaintiffs are entitled to recover, if such a state of facts is shown."

of an easement; thirdly, that the defendant's release to the Commonwealth was no eviction, being merely a release of a claim to compensation, which could not have fallen within the ancient warranty, which had regard to things corporeal, and therefore could not fall within the modern covenant; and fourthly, that the release could not pass a right of entry to the Commonwealth, inasmuch as that right was in her from the beginning.[1]

[1] "In England," said Gibson, C. J., "the feudal warranty was superseded by a covenant of warranty, which in turn seems to have given place in that country, but in few of the American States, to what conveyancers call the five common covenants of title; namely, a covenant of seisin, a covenant that the grantor had a right to convey, a covenant for quiet enjoyment, and a covenant for further assurance; for the last of which Chancellor Kent substitutes the covenant of warranty, still retained by us, and on which this action is brought. It has been thought by country scriveners, and even by members of the profession, to contain the elements of all the rest; but the terms of it are too specific to secure the grantee against every disturbance by those who may have a better title. It binds the grantor to defend the *possession* against every claimant of it by right, and it is consequently a covenant against rightful eviction. To maintain an action for a breach of it, as may be seen in Clarke *v.* McAnulty, 3 Serg. & Rawle, 364, Paul *v.* Witman, 3 Watts & Serg. 407, and in the cases collected in a note to 4 Kent, 471, an eviction must be laid and proved, not necessarily by process or the application of physical force, but by the legal force of an irresistible title. There must be proof at least of an involuntary loss of the possession.

"It would scarce be thought that a covenant of warranty extends to an entry by the authority of the State, in the exercise of its eminent domain. Like any other covenant, it must be restrained to what was supposed to be the matter in view; and no grantor who warrants the possession dreams that he covenants against the entry of the State to make a railroad or a canal; nor can it be a sound interpretation of the contract that would make him liable for it. An explicit covenant against all the world would bind him, but the law is not so unreasonable as to imply it. The entry of the public agents, and the occupancy of the ground, were not a breach of the warranty.

"Nor was it an eviction even of the ground taken for public use; certainly it was not a disseisin. The entry was on the enjoyment of an easement, which was at most a disturbance that left the seisin, and a qualified use of the possession, in the grantee. If the subject matter were in other respects within a covenant for quiet enjoyment, the public invasion of it might have been a breach of it; but it was not an eviction. In contemplation of law, the grantee was still the owner and possessor, and might have gained an indefeasible title to the property, by the statute of limitations, against an adverse claimant by superior right. He might continue to do any act of ownership consistent with the public franchise, reserved from the beginning. He might lay pipes or open a quarry under the canal, or enter on any other enjoyment of the soil that would not interfere with the works or impede the navigation.

"Was the antecedent release of ultimate compensation an eviction? An eviction of what? Of a right to claim. Strange subject of an eviction! Having been executed before the conveyance, the release, if an eviction of any right, was an eviction of the grantor's right, for the grantee could not be evicted of what he had not received. The construction of the canal was subsequent to the conveyance; and if there was an eviction at all, it was not by the sealing of the release, but by the entry of the State, which, we have seen, was not a

§ 153. The correctness of the first of these grounds of decision is beyond question; the doctrine that the exercise of the right of eminent domain is a breach of the covenants for title is not even susceptible of argument,[1] and the contrary has not only been recently reaffirmed in Pennsylvania, but has been in other States lately applied in a peculiar and interesting class of cases already noticed.[2] As to the other grounds of the decision, however, some exception may perhaps be taken. The position that there had been no eviction of the land, but merely an interruption of the enjoyment of an *easement*, is met by the numerous authorities which decide that such an interruption, when made by title, by *an individual*, is a breach of the covenants for quiet enjoyment or of warranty.[3] The position that the defendant's release to the Commonwealth was no breach of the modern covenant because as was supposed it would have been no breach of the ancient warranty, would seem to be not altogether accurate either as to premises or conclusion, as warranty did, as has been seen, extend to many incorporeal hereditaments,[4] and even if it did not, the

disseisin within the warranty. The release was, if possible, still less so. The claim to compensation, being no more than the benefit of a chance, was an ideal thing; and, though of appreciable value, it would not have fallen within the ancient warranty, which had regard to things corporeal, and differed from its successor chiefly in regard to the voucher to warranty and the recompense in value. It therefore cannot fall within the modern covenant.

"A part of the argument has been that the release passed a right of entry to the State, as well as extinguished the compensation for it. But the releasor could not convey a right that was in the State from the beginning, and one that could be exercised without his consent on the single condition of compensating the owner. The release forestalled the compensation, and it did no more. It was not a breach of a subsequent and prospective covenant, not even against incumbrances; and, running as it did with the land, it could not by any construction be more than a clog on the enjoyment."

[1] Bailey *v.* Miltenberger, 31 Pa. 37, and see *supra*, § 129.

[2] Cases in which slaves having been sold with a covenant of warranty that they were slaves for life, the covenant has been held not broken by the subsequent emancipation of the slaves under the proclamation of 1863. *Supra*, § 129.

[3] See *supra*, p. 207, n. 2.

[4] Thus it will be found in the Year Book 43 Ed. III. 25, and 9 Hen. VI. 56, that a *warrantia chartæ* will lie on the grant of an advowson with warranty, and see *supra*, § 11, n. 1. Warranty was, moreover, before its disuse, extended to many things which it would not formerly have been held to embrace; for although Coke says "a warrantie does not extend to any lease, though it be for many thousand years, or to estates of tenant by statute staple or merchant, or *elegit*, or any other chattel, but only to freehold or inheritance;" Co. Litt. 389; yet the case of Pincombe *v.* Rudge, Hob. 3, shows that in the seventeenth century warranty, when annexed to the assignment of a leasehold, was used as a personal covenant; *supra*, p. 15, n. 4, § 113. And it has been somewhat recently held that where the subject of a conveyance lay in grant and not in livery, and was therefore insus-

modern covenants were expressly introduced, among other reasons, for the very purpose of extending the scope of the warranty which

ceptible of any other than a constructive seisin, any eviction which might happen must consequently be of the same nature as the possession. Thus in Lukens *v.* Nicholson, 4 Phila. R. 22, it was said: "This case turns in substance on the question whether the assignee of a rent reserved on a conveyance in fee, whose estate is defeated by his own failure to put the deed of assignment on record, and the subsequent execution of a mortgage by the assignor, can recover compensation from the latter by an action on a covenant of special warranty contained in the assignment, without any other allegation or proof of an eviction than that arising from a suit on the mortgage, followed by a judgment and the sale of the rent by the sheriff under a *levari facias*. It is undoubtedly true that such a sale is not an actual dispossession, and that no one can be said to be evicted, under ordinary circumstances, until he is actually dispossessed. But it is equally true that when dispossession is impossible, as when the plaintiff has not been and could not be possessed, proof of an actual ouster will be dispensed with, and it will be enough to show that he has been deprived of all power or possibility of enjoyment by a default on the part of the defendant, which is, in other respects, such as to amount to a breach of the warranty. Applying these principles to the present case, we find that the estate warranted lying in grant and not in livery, was insusceptible of an actual or of any other than a constructive seisin, and that any eviction which might happen must consequently be of the same nature as the possession. And it is equally plain that the sheriff's sale stripped the plaintiff of the whole right and title to the rent, and by taking away the right to possess, necessarily took with it the only possession which can exist in the case of an incorporeal hereditament. An attornment by the tenant of the land to the purchaser might perhaps have been requisite had the question arisen on a grant at common law, but no attornment is necessary under the statute of Uses; and besides, the sale was the act of the law, to which the law will presume that every man, and consequently the tenant, assented. It has indeed been said that it was the plaintiff's duty to wait until some act was done or claim made adversely by the purchaser, and then, and not till then, proceed on the warranty. But those who urge this argument forget that the sale left the plaintiff without any right to the rent, or means of redress against the tenant of the land out of which the rent issued; that any payment to him would have been a mispayment; that any suit which he might have brought, or distress which he could have levied, would have been destitute of legal validity, and would necessarily have exposed him to costs and damages. Unless, therefore, it can be said that he was bound to lie out of the rent for an indefinite period, without compensation, in attendance upon the pleasure of others, he was necessarily entitled to sue as soon as the sale was made."

The case of Kinney *v.* McCullough, 1 Sandf. Ch. (N. Y.) 370, may be here noticed. The defendant and one Halsey, being the owners as copartners of certain valuable stores which were subject to two mortgages, the former, at the dissolution of the partnership, sold his undivided interest to the latter, who assumed as part of the consideration the payment of the mortgages, which were exempted from the covenants for quiet enjoyment contained in the deed. The purchaser then executed another mortgage to the complainant, who foreclosed it and at the sale bought the stores himself. The lien of the prior mortgages was not divested by this sale, and they were subsequently foreclosed and the property sold again while in the hands of the complainant and the money brought into court for distribution, when it appeared that at the time of the sale of the stores by the defendant he had agreed to assume the payment of another mortgage to one Phillipon, which they had jointly given for a debt of the firm, but which had not been then placed on record. He

they superseded.[1] And as to the position that the release could not pass a right of entry to the Commonwealth inasmuch as that right was in her from the beginning, the proposition as thus broadly stated must be denied. For although the right of eminent domain is one paramount to the enjoyment of all the land within the borders of a State, yet under the constitutions of all the States and the Fifth Amendment of the Constitution of the United States, it cannot be exercised unless compensation be first made or provided to the owner,[2] and without such compensation, any taking of private property for public use is an unlawful taking.[3] But the release by the owner of his right to compensation makes that lawful which otherwise would be unlawful,[4] and it is difficult to see the distinction between the release of such a right to the Commonwealth and the grant to a stranger of the right to construct a canal or railroad upon the land, whose exercise would under all the authorities have been a breach of the covenant.[5]

did not, however, pay the mortgage, but with the intention of throwing the debt upon the stores caused it to be recorded just before the execution of the mortgage under which the complainant purchased. The mortgagee was, therefore, entitled to payment out of the surplus remaining after the two oldest mortgages had been satisfied, and this consumed the whole fund, leaving nothing for the complainant, who thereupon filed a bill against the defendant for payment of the amount thus lost. His right to a decree was sufficiently obvious, but it was objected on behalf of the defendant, that the complainant had a sufficient remedy at law upon the defendant's covenants on the sale to his late partner, the benefit of which had passed to the complainant; but the court said: "This would have been the case, unquestionably, if Phillipon's mortgage had been foreclosed while the complainant remained in possession, and the complainant had been ousted thereby. But no such eviction has occurred. The complainant was turned out by a title paramount to both, but which left to him a surplus in money, not a portion of the land. He has been evicted from that surplus by Phillipon's mortgage. This is not such a legal eviction as will sustain an action at law upon the covenants in the conveyance to Halsey." In support of this point, however, the learned Vice-Chancellor relied on the earlier New York cases, which have been already referred to as having been overruled, *supra*, § 143, p. 193, n. 1.

[1] As has nowhere been better expressed than by the learned judge who delivered the opinion in Dobbins *v.* Brown, *supra*, p. 209, n. 1. See Stewart *v.* West, 14 Pa. 638; *supra*, p. 173, n. 4.

[2] Cooley on Constitutional Limitations, ch. xv.

[3] Thus although of course the Commonwealth herself cannot be restrained from the unlawful exercise of the right of eminent domain, yet nothing is better settled than that those to whom she delegates that right can be restrained to precisely the same extent as though the interruption were made by a stranger. Bonaparte *v.* C. & A. R. R., 1 Bald. (C. C. U. S.) 205; Redfield on Railways, c. 29.

[4] "The release," says the opinion, "forestalled the compensation, and it did no more." True, but it did do that, and it was the very forestalling of the compensation which worked the injury.

[5] The decision in New York, of Murray *v.* Jayne, 8 Barb. S. C. 612, may be

In another case in Pennsylvania,[1] the owner of a furnace and grist-mill had made an offer to the Commonwealth that if the canal commissioners would raise the height of his dam, he would allow them a sufficient supply of water to feed the canal. The commissioners, without taking any notice of this offer, erected a gate at the head of the race leading to the mill and furnace, and in spite of objection from the owner diverted the water therefrom whenever the low state of water in the canal rendered this necessary. The premises were afterwards leased, with a covenant "to warrant

incidentally referred to as corroborative of the suggestion thus made as to the decision in Dobbins *v.* Brown. The defendants, commissioners under an act of the legislature to raise money to drain the drowned lands in Orange County, made a parol agreement with the two tenants in common of a farm at the outlet of the drowned lands, by which the commissioners obtained permission to enter upon the farm and open a canal through it. No damages were appraised or ascertained, but it was agreed that they should be, and that the taxes which the commissioners should thereafter assess upon the farm from time to time should be deducted therefrom, and the balance of damages paid by the commissioners. The latter entered upon the land and continued in possession for more than twenty years, but omitted to have the damages ascertained, though requested to do so. The plaintiff subsequently purchased the farm from the tenants in common, and the commissioners having advertised it for sale for non-payment of taxes, the plaintiff filed his bill for an injunction on the ground that the agreement was one which had it been under seal would have been a covenant running with the land, and as it was one which a court of equity would enforce it must be regarded as having passed to the plaintiff under his deed; and the court held that the plaintiff was entitled to an injunction and that the true construction of the agreement was that the commissioners were to collect no taxes till the damages were ascertained. "It was said upon the argument," said Brown, J., who delivered the opinion, "that the damages were personal and not real property, and therefore did not pass to the plaintiff by force of the deeds of conveyance. This argument would have had more force if the damages had been ascertained and declared before the execution of the deeds. There would then have been a fixed and definite sum due and payable from the commissioners to the owner, which might have been recovered in an action at law. The severance of the damages for the lands, in respect to which they accrued, would have been in a measure complete, and they would then have assumed the aspect and the attributes of personal estate. The entry upon the lands and the opening of the canal were not tortious acts creating a right of action which died with the person or survived with the representative; but the entry was under an agreement and license to purchase, pay for, and acquire the title at a future period. Until the title was thus acquired, there was no such severance of the damages from the lands as converted them into personal estate, and they consequently passed with the deeds as part and parcel of the thing granted. . . . The agreement to exempt the lands from taxation to the extent of the amount of the damages, would, had the contract been under seal, be a covenant running with the land. Vyvyan *v.* Arthur, 1 Barn. & Cress. 410; Vernon *v.* Smith, 5 Barn. & Ald. 1; Bally *v.* Wells, 3 Wilson, 25. And if the agreement be such as courts of equity will enforce, for that purpose and to that extent it must be regarded as having passed to the plaintiff under the deed."

[1] Peters *v.* Grubb, 21 Pa. 455.

and defend the same to the lessees against the claims, interruption or molestation of any person whomsoever, so that the lessee should suffer no loss from any defect of title of the lessor to the premises." Soon after the execution of the lease, the agents of the Commonwealth notified the lessees that unless there was a rise of water before a certain day, they would be obliged to shut off the water from the furnace, and shortly after, the gate was closed entirely. It was contended that the lessors were not liable on the covenants in the lease — that the case was less strong than that of Dobbins *v.* Brown, as the vendor there had released his claim for damages, while in the present case the lessees enjoyed the premises in subordination to the rights of the Commonwealth,[1] but the Supreme Court held that the covenant must be taken to embrace all existing antagonistic claims, whether on the part of the Commonwealth or of private persons — that if the original entry of the State under the right of eminent domain had been

[1] The charge of the court below as to this was: "The covenant of course extended only to *lawful* interruptions. No man is presumed to covenant against lawless ones, as the tenant can protect himself against them by actions of trespass, which the landlord could not sustain he having parted with the possession. Nor would it be presumed that the landlord covenanted against any original entry by the State to make roads, take and use the water, or exercise other acts of prerogative. No man is presumed to contract against bare possibilities without express words. Besides, for such injuries the tenant has his redress by claiming damages, which it is to be presumed the public will accord and pay. If then the State had entered for the first time and drawn off the water after the lease was executed, we should hold that it did not come within the covenant for quiet enjoyment, although the same is expressed in strong and broad terms. The tenant would have to seek his redress by asking for damages under the internal improvement laws. But in the present case the entry had been made some thirteen or fourteen years before the dam was built, water drawn off when required for the canal, and the damage, if any, was done to John Gamber the then owner, and paid or presumed to be settled with him. The right to exclude him entirely from the use of the water had been claimed by the State agents but never exercised, had been a subject of dispute between him and them, and also with the plaintiffs after their purchase. Shippen in taking his lease would very naturally apprehend difficulty about the use of the water, and as the defendants denied the right of the State to stop their works, it is no more than probable that they would guarantee against it. Have they done so? We consider the words quite broad enough to cover the case, and applicable to it, more especially as there does not appear to have been any other disputed right, no defect or apprehended defect in the title, or pretence of right in any other person to interrupt the tenant in the enjoyment of his lease. . . . If you believe these parties had in view the claim of the State to interrupt the occupant in the use of the water, and made the contract with a view to that, we instruct you that the covenant for quiet enjoyment in the lease is broad enough to protect the tenant or his assignees, and render the lessors responsible for the damages sustained by reason of such interruption."

subsequent to the date of the lease, the case of Dobbins *v.* Brown might have ruled the case in their favor, but that the works of the Commonwealth having been erected for some years prior to the date of the lease, and the right to use the water when necessary claimed and to some extent exercised, under objection by the owner who claimed that his was the better right to the exclusive use of the water, it could not be doubted that the covenant for quiet enjoyment was intended by the parties to protect against this claim on the part of the Commonwealth.[1]

So where the defendant, having laid out a tract of land in lots and streets, conveyed to the plaintiff a lot described as bounded by certain streets, together with all "ways, etc. thereunto belonging or in any wise appertaining," it was held that the description imported a warranty that the streets existed which was broken by the defendant's failure to open them.[2]

So in a very recent case in New York, mill property was conveyed by metes and bounds, with no express mention of a right to flood the neighbor's land above. The grantee was afterwards compelled, by an action for damages for flooding this land, to reduce the height of the dam below that at which it stood at the time of the conveyance, "and therefore," said the court, "was not merely deprived of an easement in another's land which was not conveyed and which his deed did not purport to convey, but he lost by force of the paramount title a thing actually conveyed, included within the metes and bounds of his deed, and just as much property granted by that conveyance as if it had been a particular acre of the land. Considering the subject matter of the grant, the peculiar character of the property as a water-power and a mill-site, the existence of the dam at a height essential to that power and to the full enjoyment of the property, we hold that the deed conveyed the dam at its existing height, and the covenant of warranty was broken when the grantee was compelled in whole or in part to take it down." [3]

[1] "If there was error," said the court, "in submitting to the jury the question of the intent of the parties, the defendants have no just cause of complaint, as in the opinion of this court the intent might have been inferred as matter of law."

[2] Trutt *v.* Spotts, 87 Pa. 339. The case was distinguished from Bellinger *v.* Burial Ground Society, 10 id. 135, on the ground that in the latter case a street had actually been laid out by the public authorities before the conveyance was executed of the lot bounded thereby, and was subsequently vacated by the same authorities.

[3] Adams *v.* Conover, 87 N. Y. 422. The

So where the defendant leased to the plaintiffs a mill, with the machinery and mill privilege, "the water-power to be of the same extent as that enjoyed by the present lessee," the Supreme Court of Nova Scotia held that the diminution of the supply of water which the evidence tended to show was caused by the acts of the defendant or his tenant of the land above and resulted in injury and loss to the plaintiffs, was a breach of the covenant for quiet enjoyment.[1]

§ 154. In reviewing the numerous cases upon the subject of what constitutes an eviction within the covenant of warranty, it seems proper to recur to the remark, which has elsewhere been made in the course of this treatise, that covenants for title should not and cannot be regulated in all cases by the artificial and technical rules which properly govern the law of real estate. Reference may be had, therefore, not only to the intention of the parties as expressed in the conveyance which contains the covenants, but also to the local practice of conveyancing itself. In those parts of this country, if any such exist, where the refinements of English conveyancing prevail and the covenants for title are inserted with exactness and fulness, the omission of a covenant for seisin or against incumbrances would justify the inference that the terms of the contract did not give the purchaser the peculiar benefit which such a covenant strictly confers; and the more exactly and particularly the covenants were expressed the more rigid would be their construction. So far, however, from such being the practice of conveyancing in this country, it is rarely if ever the case that the covenants for title which are inserted are expressed otherwise than very briefly. So in some

court continued, "The case, therefore, does not come within the rule of Green *v.* Collins, 86 N. Y. 246, nor is it like Burke *v.* Nichols, 2 Keyes, 670. In neither of these cases was the grantee evicted from anything which passed by the grant. That plain line of distinction separates both from a case like the present, where the thing lost was covered by the conveyance and embraced within its description, and the deed both conveyed, and as we construe it purported to convey, the identical thing destroyed by a paramount title." *Supra*, p. 206, n. 5.

[1] Parker *v.* Fairbanks, 1 Russ. & Ches. (N. Sc. L.) 215. "The defendant," said the court, "positively stipulated in effect that the plaintiffs should have, during the term, a flow of water of a certain amount, which by undenied evidence for a certain period of the term the plaintiffs did not in fact enjoy. The result was, proved damages. The defendant failed to show, he did not even attempt to show, that the deficiency of water-power was occasioned by causes of a nature that rendered it impossible for him to perform the covenant in question, and which in law would discharge him from his obligation to perform it."

of the States, long-settled usage has caused the omission of all the covenants for title except that of warranty, which, by common practice at least, is looked upon as containing all that is necessary to assure the title to the purchaser.[1]

Where such has become the settled practice of a State, it is suggested, with great deference, that technical rules based upon a different custom of conveyancing as respects these covenants lose to some extent their application, and to say that "the purchaser should have protected himself by other covenants," is to apply a hard rule in States where those other covenants are never employed.[2] And as was said in a somewhat recent case in New York, "The tendency of all courts governed by the rules of the common law is to favor and facilitate the remedies on covenants for title."[3]

§ 155. The pleadings in an action on the covenant of warranty may here be considered in connection with those in an action on the covenant for quiet enjoyment. It has been seen that many authorities have, in a general way, said that these are synonymous covenants. They are less so, perhaps, in respect to the pleadings than in any other. The following essentials to the plaintiff's averment are, however, common to both: —

The breach must be set forth particularly, for, as is the case in an action on the covenant against incumbrances,[4] the burden of proof is upon the plaintiff, and it is not enough to negative the words of the covenant.[5]

The disturbance must be averred to have been under lawful

[1] Funk *v.* Creswell, 5 Clarke, (Io.) 93; Butt *v.* Riffe, 78 Ky. 352.

[2] A branch of this subject of eviction is that of the purchaser's right to detain the unpaid purchase money by reason of a defect of title. Such a right depends (except in Pennsylvania) upon the defect in question coming within the covenants for title he has received, and is, according to the weight of modern authority, sanctioned to the extent to which the purchaser would be, at that time, entitled to damages upon the covenants. It is attempted fully to consider this subject in a subsequent part of this work (see Ch. XIV.), where it will be seen that although there are many cases which profess to lay down a strict rule and to deny this right "unless there has been fraud or an eviction," yet there are few, if any, which deny to the purchaser the right to set off the amount *bona fide* reasonably and necessarily paid by him to buy in the paramount title, even where the only covenants are those for quiet enjoyment or of warranty.

[3] Bordewell *v.* Colie, 1 Lans. (N. Y.) 146.

[4] *Supra*, § 86.

[5] Blanchard *v.* Hoxie, 34 Me. 378; Wait *v.* Maxwell, 4 Pick. (Mass.) 87; Mills *v.* Rice, 3 Neb. 76; Morgan *v.* Henderson, 2 Wash. Ter. 367; and see the cases referred to *supra*, § 86.

title, for otherwise there would be nothing to show it was not a mere trespass.[1]

Of course, however, these rules do not apply to an interruption made by the covenantor himself or those claiming under him,[2] nor to a case in which the covenant is against the acts of a particularly named person.

But having averred that the interruption was made under lawful title existing before and at the time of the conveyance to the covenantee,[3] it is not necessary that that title should be set forth particularly,[4] for although it is in general necessary for the plaintiff to examine the title under which the interruption was made so far as to satisfy himself that it was not tortious, and that his remedy must be, not against the party making it, but against the covenantor, yet if he were to attempt to set out the particulars of this title, it might, if not correctly pleaded, be successfully traversed by the defendant.[5]

[1] Hays *v.* Bickerstaff, Vaugh. 118 ; *supra*, § 127. *Claiming* title is not sufficient. Norman *v.* Foster, 1 Mod. 101. "*Habens titulum* would have done your business," said Hale, C. J.

[2] Kirby *v.* Hansaker, Cro. Jac. 315 ; Skinner *v.* Kilbys, 1 Show. 70 ; Jordan *v.* Twells, Cas. temp. Hardw. 172 ; Wotton *v.* Hele, 2 Saund. 181, and see the authorities collected in the note ; Fraser *v.* Skey, 2 Chitty, 647 ; Kelly *v.* Dutch Church, 2 Hill, (N. Y.) 105 ; Naglee *v.* Ingersoll, 7 Pa. 205 ; Knapp *v.* Marlboro, 34 Verm. 235 ; Peck *v.* Houghtaling, 35 Mich. 127.

[3] Frost *v.* Earnest, 4 Whart. (Pa.) 86 ; Naglee *v.* Ingersoll, *supra ;* Crisfield *v.* Storr, 36 Md. 148.

[4] Proctor *v.* Newton, 2 Lev. 37 ; Buckley *v.* Williams, 3 id. 325 ; Jordan *v.* Twells, Cas. temp. Hardw. 161. It was earnestly contended in Foster *v.* Pierson, 4 Term, 617, and Hodgson *v.* East India Company, 8 id. 278, that the plaintiff should have set forth the adverse title under which he was expelled ; but Kenyon, C. J., said, in the latter of these cases, "I do not know how it was possible for him to set forth the particulars of the titles of the persons who entered upon him ; such knowledge could only be acquired by an inspection of title deeds to which he could have no access." See also note to Browning *v.* Wright, 2 Bos. & Pull. 14.

[5] A form of a breach of the covenant for quiet enjoyment is thus given in 2 Greenl. Evidence, § 243 : "After reciting the execution of the deed and the covenant in its very words, 'Now the said plaintiff in fact says, that he has not been permitted so to possess and enjoy the said premises ; but on the contrary he avers, that, after the making of the said deed, to wit, on the —— day of ——, one E. F., who at the time of making said deed had, and ever since, until the molestation of the plaintiff hereinafter mentioned, continued to have lawful right and title to said premises, did enter into the same, and did thence eject, expel, and remove the plaintiff, and hold him out of the possession of the same, contrary to the form and effect of the covenant aforesaid, etc.' "

This form is concise in the extreme. One more full and precise will be found in 2 Chitty's Pleading, 545, 546, containing also an averment of costs incurred in defending an ejectment, and also of expenses in improvements. (See as to the latter Lewis *v.* Campbell, 3 J. B. Moore, 35, and *infra*, Ch. IX.) Another still more full, in which the breach assigned is an interruption by persons claiming common of pasture, will be found in 5 Wentworth's Pleading,

§ 156. On the trial, the burden of the proof is, as a general rule, obviously thrown directly upon the plaintiff in the first instance. It may, however, be shifted. As where the breach having been said to be the inability of the plaintiff to obtain possession by reason of an outstanding paramount title in a third person, the defendant pleaded that such paramount title was not in such third person but in himself and had been well conveyed by his deed to the plaintiff, and it was held that the defendant, by his plea, assumed the burden of proof.[1]

56–60, and another in 5 id. 63, where, on a covenant for quiet enjoyment and against incumbrances, the breach assigned was that the defendant suffered the ground-rent to fall in arrear, *per quod* the plaintiff was obliged to pay it to avoid distress. A good form will also be found in Lewis *v.* Campbell, 3 J. B. Moore, 35; s. c. 8 Taunt. 715. See also Dexter *v.* Manley, 4 Cush. (Mass.) 14; Evans *v.* Vaughan, 4 Barn. & Cress. 261; and the cases to which reference has been made on p. 123 *et seq.* Some old forms may also be found in 2 Ventris, 60; Robinson's Entries, 171; Winch's Entries, 112–118; Hobart, 34. In Shafer *v.* Wiseman, 47 Mich. 63, it was obviously held that where the plaintiff declared broadly on a covenant of warranty in a deed which conveyed an equity of redemption after a mortgage, which was excepted from the covenants against incumbrances, there was a variance.

[1] Owen *v.* Thomas, 33 Ill. 320.

CHAPTER IX.

THE MEASURE OF DAMAGES.

§ 157. Upon the subject of the measure of damages for a breach of the covenants for title, it has been said by a late English writer of authority, "The cases upon this point in England are very scanty, while they are to be found in remarkable abundance in America." [1] Upon the warranty of ancient law no damages whatever were recoverable, unless perhaps in case the warrantor had not other lands wherewith to replace those which his warrantee had lost.[2] And the value of the lands was taken to be that at the time of the warranty made, so that "if land be better after feoffment, by buildings or otherwise, he who recovers in value recovers but according as the land was worth at the time of the feoffment, and no more." [3] The change from the ancient to the modern

[1] Mayne on Damages (3d ed., 177), and he adds, "It is to be regretted that the multiplication of courts of independent jurisdiction in that country should make their decision often a source of embarrassment rather than an assistance in legal investigation." It is this which obviously makes the task of a text writer so much more difficult in America than in England.

[2] *Supra*, §§ 2, 12.

[3] Year Book 30 Edw. III. 14 *b*. So in 47 Edw. III. 32, it is said: "On voucher, if special matter be shown by the vouchee, viz. that the land at the time of the feoffment was worth only £100, and now at the time of the voucher is worth £200 by the industry of the feoffee, the tenant shall recover only the value as it was at the time of sale; for if the act of the feoffee has meliorated the land, this shall not prejudice the feoffor in his warranty." So in 19 Hen. VI. 46 *a*, 61 *a*, Brooke's Ab. Voucher, pl. 69; id. Recouver in Value, pl. 59; and this was recognized to have been the law in Humphrys *v.* Knight, Cro. Car. 456. So in Bellel *v.* Bellel, Godbolt, 151, "If there be new buildings, of which the warranty was demanded, which were not at the time of the warranty made, and the deed is shown, the defendant ought not to demur, but to show the special matter, and enter into the warranty for so much as was at the time of the making of the deed, and not for the residue." See also 1 Reeves's History of the Common Law, 448. And there was no difference as to this between express and implied warranties. Gilbert on Tenures, 124.

It has been considered by high American authority that "the point is too clear to admit of doubt that the increased value of the land by buildings or other improvements made no alteration at common law in the rule of damages." Per Kent, C. J., in Pitcher *v.* Livingston, 4 Johns. (N. Y.) 1; so per Tilghman, C. J., in Bender *v.* Fromberger, 4 Dall. (Pa.) 442; per West, C. J., in Staats *v.* Van Eyck, 3 Caines, (N. Y.) 111. See these cases *infra*, p. 222 *et seq.*

system of law, bringing with it, as it did, the change from warranty to the covenants for title, brought, it would seem, no change in the rule of damages,[1] though as to this we must judge rather from the absence than the presence of contemporaneous authority.[2]

[1] Flureau *v.* Thornhill, 2 W. Black. 1078, has often been cited as a direct authority for this position. But that well-known case decided no more than that upon *a contract* for the purchase of real estate, to which the vendor was (without fraud or fault of his own) unable to make a title, the purchaser was not entitled to damages for the fancied goodness of the bargain which he had lost — a rule which, though then for the first time laid down and since at times doubted, is supported by the weight of authority on both sides of the Atlantic. 1 Sedgwick, Measure of Damages, 406, *n.* (7th ed.); 2 Sutherland on Damages, 207. "The rule of the common law is," said Parke, B., in Robinson *v.* Harman, 1 Exch. 850, "that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same condition with respect to damages as if the contract had been performed. The case of Flureau *v.* Thornhill qualified that rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title, so that when a person contracts to sell real property there is an implied understanding that if he fail to make a good title the only damages recoverable are the expenses which the vendee may be put to in investigating the title."

An exception was at one time engrafted upon this exception in cases where the vendor knew that his title was defective or otherwise acted in bad faith, and as to this Hopkins *v.* Grazebrook, 6 Barn. & Cress. 31, was the leading case in England, and has been followed in some of our States. Drake *v.* Baker, 34 N. J. 358; Pumpelly *v.* Phelps, 40 N. Y. 59; Lea *v.* Dean, 3 Whart. (Pa. 31; Bitner *v.* Brough, 11 Pa. 127; Burk *v.* Serrill, 80 id. 413; Hammond *v.* Hannin, 21 Mich. 374 (where the subject was carefully treated); Mayne on Damages (3d ed.), 170 *et seq.*; 2 Sutherland on Damages, 207 *et seq.*; 1 Sedgwick on Damages, 406, *n.* (7th ed.); in which treatises the subject is elaborately considered. In England, the course of decision for many years varied between Hopkins *v.* Grazebrook and Flureau *v.* Thornhill; (Walker *v.* Moore, 10 Barn. & Cress. 416; Robinson *v.* Harman, *supra*; Worthington *v.* Warrington, 8 Com. Bench, 134; Pounsett *v.* Fuller, 17 id. 660; Sikes *v.* Wild, 1 Best & Smith, 587, affirmed s. c. 4 id. 421; Engel *v.* Fitch, 3 Q. B. 314, affirmed 4 id. 659;) until finally in the late case of Bain *v.* Fothergill, L. R. 6 Exch. 59, affirmed in the House of Lords, 7 H. L. 158, the doctrine of Flureau *v.* Thornhill was carried to the full extent, and Hopkins *v.* Grazebrook declared not to be the law. "The rule as to the limits within which damages may be recovered upon the breach of a contract for the sale of real estate," said Lord Chelmsford, "must be taken to be without exception. If a person enters into a contract for the sale of real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expense he has incurred *by an action for the breach of the contract.* He can only recover other damages by an action for deceit."

[2] Gray *v.* Briscoe, Noy, 142, seems to be the only case in the books, and as Mr. Sedgwick (1 Measure of Damages, p. 314, 7th ed.), properly says of it, "It well illustrates that want of any precise measure of damages which characterizes almost all the early English decisions. B. covenants that he was seized of Bl.'s acre in fee simple, when, in truth, it was copyhold land in fee, according to the custom. By the court: The covenant is [not] broken, and the jury shall give damages in their consciences according to the rate that the county values fee-simple land more than copyhold land." In Lewis

For reasons which have been referred to in another part of this treatise,[1] the cases as to covenants for title are much more numerous on this side of the Atlantic than in England, and the subject of the measure of damages upon their breach has here been handled with fulness and precision.

§ 158. The first question which was here presented, as between vendor and purchaser, as to the measure of damages relatively to increased value of the land, was upon a breach of the covenant for seisin.

In Staats *v.* Ten Eyck,[2] decided in New York in 1805, the question before the court was simply whether the vendor should be held liable for a rise in the value of the land from adventitious sources independently of beneficial improvements, and the policy of the rule under the old warranty was declared by the court[3] to be based upon reason and authority, and the measure of damages declared to be the value of the land at the time of sale, the best estimate of which was found in the consideration money paid. The question as to beneficial improvements was not presented.

This case was in the next year followed in Pennsylvania by Bender *v.* Fromberger,[4] where a verdict was found for the plaintiff subject to reduction if the court should be of opinion that he was not entitled to recover the value of improvements made after the purchase; and notwithstanding an able argument for the latter, the measure of damages was held to be limited by the consideration money.[5]

v. Campbell, 8 Taunt. 728, where the plaintiff in an action on the covenant for quiet enjoyment claimed to recover the value of certain buildings, &c., by which he had converted the land into pleasure-grounds, the research of counsel was unable to produce any authorities on the subject, and Dallas, C. J., said, "I very much doubt whether in any case a plaintiff can recover for the improvements and buildings he may choose to make and erect upon the lands;" and the whole court were of opinion that, in the form in which special damage was assigned in the declaration, the value of the buildings could not be recovered. And see the later cases in England, *infra*. So, as was said in the early case in Kentucky, of Cox *v.* Strode, 2 Bibb, (Ky.) 277, "In all the comments made by the elementary writers on the change introduced by the covenants for title, none mention any change in the amount of recompense to the plaintiff, which would scarcely have happened in case these covenants had introduced a new measure of damages."

[1] *Supra*, § 16.

[2] 3 Caines, (N. Y.) 111.

[3] Per Kent, C. J.

[4] 4 Dall. 442.

[5] "It has been contended," continued Tilghman, C. J., who delivered the opinion, "that the true measure of damages in all actions of covenant is the loss actually sustained. But this rule is laid down too generally. . . . The rise in the value of land, not only in towns on the sea-coast, but in the interior part of the United

In the subsequent case in New York of Pitcher *v.* Livingston, decided in 1809, although the matter was treated as *res integra*, the decisions just referred to were approved and followed. It was considered that as to the allowance for improvements the common law was unquestioned, and that it was never designed by the introduction of covenants to establish any other value of damages. The rule of the civil law left the damages to an arbitrary and undefined discretion and destroyed anything like a fixed rule. Whatever expectations of rise in value the purchaser may have had were confined to him alone, and could not have entered as an ingredient into the bargain. It was the land and its price *at the time of sale* which the parties had in view, and to that subject the operation of the contract ought to be confined. The damages were therefore held to be measured by the consideration money.[1]

The authority of these leading cases has never in substance been departed from, and decisions to the same effect will be found in perhaps every State in which the covenant for seisin is employed.[2]

States, is such that it can hardly be supposed any prudent man would undertake to answer the incalculable damages which might overwhelm his family under the construction contended for by the plaintiff. I have taken pains to ascertain the opinion of lawyers in this State prior to the American Revolution, and I think myself warranted in asserting, from the information I have received, that the prevailing opinion among the most eminent counsel was, that the standard of damages was the value of the land at the time of making the contract." The case of Staats *v.* Ten Eyck was referred to in the course of the argument, as also the cases of Liber *v.* Parsons, decided in the year 1786, and of Guerard's Executors *v.* Rivers, decided in 1792, (both reported in 1 Bay, S. C. 19, 266, and both since overruled,) where the standard of damages was held to be the value at the time of eviction. These cases were said by Tilghman, C. J., to have been decided in the hurry of a jury trial, and not founded on the mature deliberation given by the New York judges in Staats *v.* Ten Eyck. It must also be observed that the South Carolina cases were both actions on covenants of warranty and not on the covenant for seisin, and the distinction between the measure of damages on these two covenants is still recognized in several of the States, though long since repudiated in South Carolina. See *infra*, § 164.

[1] 4 Johns. (N. Y.) 1. The dissenting opinion by Spencer, J., yields in force of argument to those of Kent, C. J., and Van Ness, J., with which the other members of the court concurred.

[2] Logan *v.* Moulder, 1 Pike, (Ark.) 323; Mitchell *v.* Hazen, 4 Conn. 495; Sterling *v.* Peet, 14 id. 245; Hartford Ore Co. *v.* Miller, 41 id. 112; Weber *v.* Anderson, 73 Ill. 439; Frazer *v.* Supervisors, 74 id. 282; Lacey *v.* Marnan, 37 Ind. 168; Swafford *v.* Whipple, 3 G. Greene, (Io.) 264; Cummins *v.* Kennedy, 3 Litt. (Ky.) 118; Cox *v.* Strode, 2 Bibb, (Ky.) 277; Stubbs *v.* Page, 2 Greenl. (Me.) 378; Montgomery *v.* Reed, 69 Me. 510; Crisfield *v.* Storr, 36 Md. 150; Marston *v.* Hobbs, 2 Mass. 433; Caswell *v.* Wendell, 4 id. 108; Smith *v.* Strong, 14 Pick. (Mass.) 128; Tapley *v.* Lebeaume, 1 Mo. 550; Martin *v.* Long, 3 id. 391; Willson *v.* Willson, 5 Fost. (N. H.) 234; Wilson *v.* Forbes, 2 Dev. (N. C.) 30; Bacchus *v.* McCoy,

§ 159. Although the cases thus referred to were avowedly based on the absence of fraud on the part of the vendor, yet it must not be supposed that *in an action on the covenant* fraud can be taken advantage of by the purchaser to increase his damages. So long as the distinction is preserved between tort and contract, so long must the remedy be by action in the nature of a writ of deceit,[1] and not by action of covenant.[2]

§ 160. It must however be noticed that the rule as thus stated to be settled applies perhaps in its universality only to cases between vendor and purchaser in the usual acceptation of the term, and that an exception, to be hereafter noticed, may be considered to exist first, in cases of leases, and secondly, in cases of sales where the vendor's consideration is to be secured by the purchaser's improvements.[3]

§ 161. But while the law is thus well settled where the breach is that of the covenants for seisin or of right to convey, there is a diversity of authority where the breach is that of the covenants for quiet enjoyment or of warranty, it being considered in some States that by analogy to the common law and the difficulty in the practical application of a less simple rule, the damages should be limited by the consideration money, and in others that these covenants should be regarded as covenants of indemnification, whose object therefore is to compensate the party for his actual loss at the time of their breach.[4]

§ 162. In a somewhat recent case in the Rolls Court in England, in a suit for the administration of a testator's estate, it appeared that he had conveyed several acres of land, covenanting for the title, to one who erected several houses thereon and sold them to a purchaser, who being evicted by paramount title from four of them (the testator having himself conveyed them away before the

3 Ohio, 211; Clark *v.* Parr, 14 id. 121; Weiting *v.* Nissley, 13 Pa. 655. Nichols *v.* Walter, 8 Mass. 243, was a strong case. The plaintiff had received a covenant for *seisin* from the defendant's testator in a conveyance of property in New Hampshire, the consideration for which was $18.67. The plaintiff sold the property for $113.33, with covenant of *warranty*, on which he was sued by his grantee, who had been evicted from the possession, and then recovered $555.49, being the value of the land at the time of eviction, this being the measure of damages in that State on the covenant of warranty. Notwithstanding these circumstances, the plaintiff was limited in his recovery to the amount which he had himself paid for the property.

[1] Carvill *v.* Jacks, 43 Ark. 439.

[2] This is here noticed lest some expressions in Pitcher *v.* Livingston and Bender *v.* Fromberger should mislead.

[3] See *infra*, § 168 *et seq.*

[4] See Field's Law of Damages, §§ 463–465.

sale) claimed to be a specialty creditor for the value of the houses and the land; and the Master of the Rolls, declining even to hear the plaintiff's counsel, said, "I am of opinion that the measure of the damages upon these covenants includes the amount expended in converting the land into the purposes for which it was sold." [1]

§ 163. Upon this side of the Atlantic, the first case in which the question was considered was Horsford *v.* Wright, the second case reported in Connecticut,[2] where the court said, "The constant rule of this court has been to ascertain damages by the value of the land at the time of the eviction, though the British rule [3] is to give the consideration of the deed. The diversity in this respect is undoubtedly founded in the permanent worth of their lands as an old country and the increasing worth of ours as a new country, and it is supposed that the purchaser goes on, improves, and makes the land better till he is evicted," and "immemorial usage in Connecticut" was afterwards said to be the foundation of this rule, which has always been adhered to there.[4]

So in Vermont and Maine, it was said that "this rule of damages was established at an early day." [5]

In Massachusetts, the leading case upon the subject is Gore *v.* Brazier,[6] decided in 1807, in which the court endeavored to found the practice upon English authority, saying that however convenient and proper the feudal rule might have been, yet "when lands were aliened for money, when improvements and agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that before the emigration of our ancestors, the tenant, on being lawfully ousted by a title

[1] Bunny *v.* Hopkinson, 27 Beav. 565, per Sir John Romilly. It may be here incidentally noticed that under the recent statute of 21 & 22 Vict. c. 27, commonly called Lord Cairns's Act, it is provided that "in all cases in which a court of chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance." See also, as to this act, *infra*, Ch. XV.

[2] Kirb. 3, decided in 1786.

[3] Now altered as to leases. See *infra*, p. 235 *et seq.*

[4] Sterling *v.* Peet, 14 Conn. 245.

[5] Drury *v.* Shumway, D. Chip. (Verm.) 111; Park *v.* Bates, 12 Verm. 387; Cushman *v.* Blanchard, 2 Greenl. (Me.) 268; Swett *v.* Patrick, 12 Me. 1; Hardy *v.* Nelson, 27 id. 525.

[6] 3 Mass. 523.

paramount, might maintain a personal action of covenant broken on a real covenant of warranty." [1]

In Louisiana,[2] and the Province of Quebec,[3] the rule of the civil law is of course adopted.

§ 164. The cases which support the opposite rule are much more numerous.

In South Carolina, the law was at first unsettled. The early cases adopted the rule just referred to,[4] but this was soon departed from, and the measure of damages limited by the consideration money.[5] By statute, moreover, it has been declared that "in any

[1] But see as to this, *supra*, p. 113 *et seq.* The authorities, however, cited in support of these remarks (Waters *v.* Dean, 1 Brownl. 21 ; 2 id. 164), give no different rule of damages from that which existed before at the common law. The decision in Massachusetts was, however, said to be "conformable to principles of law applied to personal covenants broken, to the ancient usages of the State, and the decision of our predecessors supported by the practice of the legislature" (some of these decisions are referred to in the opinion, but are not to be found reported), and its authority has been consistently followed in that State. Caswell *v.* Wendell, 4 Mass. 108 ; Bigelow *v.* Jones, id. 512 (and notwithstanding an apparent decision to the contrary in Sumner *v.* Williams, 8 id. 221) ; Norton *v.* Babcock, 2 Met. 516 ; White *v.* Whitney, 3 id. 89. In Sumner *v.* Williams the action was on the covenants for seisin, of right to convey, against incumbrances, and of warranty. The court refused to assess the damages by the value of the land at the time of eviction, as contended for by the plaintiffs, but at the same time treated the case as if brought upon "covenants broken at the time of the execution of the deed ;" though immediately after it is said, "Moreover, if the action had been commenced on covenants which respect the title, there is no doubt the measure of damages would have been the purchase money with interest."

[2] Bissell *v.* Erwin, 13 La. 148 ; Hale *v.* New Orleans, 18 La. An. 321. The rule of the civil law (which, in its endeavor to afford in every case a full compensation to the party injured, necessarily was in many instances arbitrary and unsettled, and which as to warranty recognized no distinction between real and personal property) may be found in the Digest, lib. xix. tit. 1, § 45 : "*Illud expeditius videbatur; si mihi alienam aream vendideris, et in eam ego ædificavero, atque ita eam dominus evinceit : nam, quia possum petentum (dominum), nisi impensam, ædificiorum solvat, doli mali exceptione summovere, magis est ut ea res ad periculum venditoris non pertineat. Quod et in servo dicendum est, si in servitutem, non in libertatem evinceretur, ut dominus mercedes et impensas præstare debeat. Quod si emptor non possideat ædificium vel servum, ex empto habebit actionem ; in omnibus tamen his casibus, si sciens quis alienum vendiderit, omnimodo teneri debet.*" See also 1 Domat, part 1, book 1, tit. 2, §§ 15, 16, 17 ; 1 Cushing's Dom. 233. For the Scotch law, see 1 Erskine's Law of Scotland, book 2, tit. 3, § 13. "Absolute warrandice in case of eviction affords an action to the disponee against the disponor, for making up to him all that he shall have suffered through the defect of the right, and not simply for his indemnification by the disponor's returning the price to him," etc.; also Dictionary of Scotch Law, tit. "Warrandice." See Sedgwick on Damages, ch. vi.

[3] Dupuy *v.* Ducondu, 6 Canada, S. C. 425.

[4] Liber *v.* Parsons, 1 Bay, (S. C.) 19 ; Guerard *v.* Rivers, id. 265 ; and see Witherspoon *v.* Anderson's Ex'rs, 3 Desaussure, 245.

[5] See an elaborate opinion of Brevard,

action or suit at law or in equity for a reimbursement or damages upon covenant or otherwise, the true measure of damages shall be the amount of the purchase money at the time of the alienation with legal interest," [1] but it was also said that the rule of law was settled long before the enactment.[2]

So in New Jersey, an early decision at Nisi Prius allowed the plaintiff to give evidence of his improvements in order to increase his damages,[3] but in subsequent cases every allowance for improvements has been rejected.[4]

So in Virginia, there was an early case to the same effect as those in New England,[5] but it was afterward departed from.[6] In Stout *v.* Jackson,[7] the subject was elaborately examined and it was held that the safer rule of damages was to measure them by the value at the time of the conveyance, and this was considered as finally settled by the subsequent case of Threlkeld *v.* Fitzhugh,[8] and the latest cases have declared this to be the settled law of the State.[9]

So in Tennessee, an early case left this question undetermined,[10] but by recent authorities it is said to be now settled.[11]

The rule that the measure of damages on the covenants for quiet enjoyment and of warranty is limited by the consideration money and interest may be said to be now settled law in the States of New Hampshire,[12] New York,[13] New Jersey, Pennsylva-

J., in Furman *v.* Elmore, cited in the note to Mackey *v.* Collins, 2 Nott & McC. 189; as also Henning *v.* Withers, 3 Brev. 458; Wallace *v.* Talbot, 1 McC. 468; Ware *v.* Weathnall, 2 id. 413; Earle *v.* Middleton, Cheves, 127; and Pearson *v.* Davis, 1 McMull. 37.

[1] Stat. 17th December, 1824, § 4; also Gen. Stats. 1882, ch. 59, p. 538, § 1832.

[2] Earle *v.* Middleton, Cheves, 127; Lowrance *v.* Robertson, 10 S. C. 8.

[3] Hulse *v.* White, Coxe, 173.

[4] Stewart *v.* Drake, 4 Halst. 142; Holmes *v.* Sinnickson, 2 Green, 313; Morris *v.* Rowan, 2 Harr. 304.

[5] Mills *v.* Bell, 3 Call, 277.

[6] Nelson *v.* Matthews, 2 Hen. & Munf. 164.

[7] 2 Rand. 132.

[8] 2 Leigh, 463; Jackson *v.* Turner, 5 id. 119; Haffey *v.* Burchetts, 11 id. 88; Click *v.* Green, 77 Va. 827.

[9] Moreland *v.* Metz, 24 W. Va. 119; Butcher *v.* Peterson, 26 id. 447.

[10] May *v.* Wright, 1 Overt. 385.

[11] Elliott *v.* Thompson, 4 Humph. 101; Shaw *v.* Wilkins, 8 id. 647; Aiken *v.* Suttle, 4 Lea, 103, 134; Moses *v.* Wallace, 7 id. 413; Mette *v.* Dow, 9 id. 93.

[12] In Loomis *v.* Bedel, 11 N. H. 87, the rule was considered to be as yet unsettled, and in Wilson *v.* Cochran, 14 id. 399, the court said, "We are not aware of any decision which settles the matter authoritatively in this State;" but in the more recent case of Willson *v.* Willson, 5 Fost. 236, the subject was carefully considered, and the damages fixed by the consideration money, and in Foster *v.* Thompson, 41 N. H. 379, this was considered as settled law.

[13] Bennett *v.* Jenkins, 13 Johns. 50; Kelly *v.* Dutch Church, 2 Hill, 116; Kinney *v.* Watts, 14 Wend. 38; Peters *v.*

nia,[1] Virginia, Ohio,[2] North Carolina,[3] South Carolina, Georgia,[4] Kentucky,[5] Indiana,[6] Tennessee, Arkansas,[7] Missouri,[8] Iowa,[9]

McKeon, 4 Denio, 550. Mr. Sedgwick (Damages, 168) mentions that the revisers of the New York statutes proposed to fix the measure of damages by the value at the time of eviction, with interest, costs, etc., but that the provision was not finally adopted. In the case of a lease, however, the rule in New York, as in England, is that the measure of damages is the value of the term lost, over and above the rent reserved. Mack *v.* Patchin, 42 N. Y. 167; and see *infra*.

[1] Bender *v.* Fromberger, 4 Dall. 441; King *v.* Pyle, 8 Serg. & Rawle, 166; Brown *v.* Dickerson, 12 Pa. 372; McClure *v.* Gamble, 27 id. 288; Cox *v.* Henry, 32 id. 19. See an elaborate argument in McClowry *v.* Croghan, 1 Grant, 307, as to the measure of damages for a breach of contract to lease, which the court held could not be measured by the value of the contract but must be limited to the consideration agreed to be paid.

[2] King *v.* Kerr, 5 Ohio, 154; Foote *v.* Burnet, 10 id. 317; Clark *v.* Parr, 14 id. 118; Vail *v.* Railroad Co., 1 Cincinnati Sup. Ct. R. 573; Wade *v.* Comstock, 11 Ohio, 82. In this State, a statute, passed 10th March, 1831, called "The Occupying Claimant Act," provided that "occupying claimants, being in quiet possession of lands under title from some public office or deed duly authenticated and recorded, or under a tax title, or sale by order of court, etc., shall not be evicted or turned out of possession by any person who shall set up and prove an adverse and better title, until the occupying claimant shall be paid the value of all lasting and permanent improvements made, etc., unless the occupying claimant shall refuse to pay the value of the land without the improvements, if demanded by the successful claimant." Statutes of Ohio, 1841, § 607. There were former statutes on this subject which this supplied. This provision is re-enacted in substantially the same words in the Rev. Stats. of Ohio, 1884, § 5786. See also as to Kentucky, Hart *v.* Baylor, 1 Hard. 597; Cox *v.* Strode, 2 Bibb, 278. If improvements are to be paid for at all, it certainly seems most rational that the expense should be borne by the party who reaps their benefit, and this rule may have the effect of forcing the real owner to a speedy assertion and proof of his superior title, since few men would be willing to pay for improvements which they did not themselves direct. The rule in equity, where its aid is invoked by the real owner, is in accordance with the principle of this statute, but is not entirely free from inconvenience in its application. See 2 Story's Eq. §§ 799, 1239, and the authorities in the note to page 1029 of Sugden on Vendors, 14th ed.

[3] Philips *v.* Smith, 1 Car. Law Repos. 475; Williams *v.* Beeman, 2 Dev. 483; West *v.* West, 76 N. C. 45; Nesbit *v.* Brown, 1 Dev. Ch. 30. This case went so far in support of the rule, that on an agreement that in case of eviction the covenantee should recover twice the consideration money and all costs, the court held this to be a penalty and that only the purchase money could be recovered.

[4] Rev. Code, 1882, p. 739, § 2948. Davis *v.* Smith, 5 Ga. 285, where is an elaborate opinion by Nesbit, J. In Martin *v.* Atkinson, 7 id. 228, the contract was executory as to one of the lots, a "bond for titles" only having been given. There were also express representations made by the vendor that he would pay for improvements. In Davis *v.* Smith, also, some of the cases cited were those of executory contracts and some on the covenant for seisin.

[5] Cox *v.* Strode, 2 Bibb, 279; Booker *v.* Bell, 3 id. 175; Hanson *v.* Buckner, 4 Dana, 253; Pence *v.* Duval, 9 B. Monr. 49.

[6] Reese *v.* McQuilkin, 7 Ind. 450.

[7] Logan *v.* Moulder, 1 Ark. 323; Carvill *v.* Jacks, 43 id. 439.

[8] Dickson *v.* Desire, 23 Mo. 166; Tong *v.* Matthews, id. 437.

[9] Stewart *v.* Noble, 1 G. Gr. 28; Swafford *v.* Whipple, 3 id. 263; Wilhelm *v.* Fimple, 31 Io. 137.

Wisconsin,[1] Maryland,[2] Nevada,[3] Nebraska,[4] Montana,[5] Texas,[6] Kansas,[7] Dakota,[8] and California;[9] and such a rule has also been adopted by the Supreme Court of the United States.[10]

Some of the reasons which support these authorities have already been given in treating of the measure of damages on a breach of the covenant for seisin, on which as we have seen it is conclusively settled in every State in the Union in which the subject has been discussed that the damages are to be measured by the value of the land at the time of its alienation, which is established *prima facie* by the consideration named in the conveyance. And if it be inquired why, if this rule be so generally and rigidly adhered to as to one of the covenants for title, has a different one been anywhere established as to another (since all the arguments drawn from the civil law in favor of recompensing an innocent party for improvements made upon the land which he had supposed was his apply with equal force to both), the only answer appears to be the technical one, that the damages are to be estimated by the value of the land at the time of the breach of the covenant. The covenant for seisin is broken as soon as it is made — that for quiet enjoyment or of warranty is not broken until eviction; hence the difference.

§ 165. This answer seems scarcely satisfactory. Technically speaking, the covenants are no more than an expression of the intention of the parties, and within certain well-defined rules these are to be construed according to this intention. A vendor when making them never dreams of such an enlarged liability by reason of his purchaser's improvements; and on the other hand, the latter takes the title for what it is worth at the time; he

[1] Blossom *v.* Knox, 3 Chand. 295; Lawton *v.* Howe, 14 Wis. 241; Messer *v.* Oestreich, 52 id. 684; McInnis *v.* Lyman, 62 id. 191; Conrad *v.* Trustees, 64 id. 258.

[2] Crisfield *v.* Storr, 36 Md. 150.

[3] Dalton *v.* Bowker, 8 Nev. 190; Hoffman *v.* Bosch, 18 id. 360.

[4] Patrick *v.* Leach, 1 McCrary, (C. C. U. S.) 250.

[5] Taylor *v.* Holter, 1 Mont. 688.

[6] Simpson *v.* Belvin, 37 Tex. 674.

[7] Stebbins *v.* Wolf, 33 Kans. 765.

[8] 2 Levisee's Rev. Codes, 1883, p. 110, § 1951.

[9] McGary *v.* Hastings, 39 Cal. 360; 1 Hittell's Code and Stats., 1876, p. 876, § 8304.

[10] Hopkins *v.* Lee, 6 Wheat. (S. C. U. S.) 118. There are many other authorities cited in 2 Greenleaf's Evidence, § 269, 4 Kent's Commentaries, 471, and Sedgwick on Damages, 175, as supporting this position, but many of them are not based upon covenants for quiet enjoyment or of warranty but upon the covenant for seisin, respecting which there has not been for many years the least conflict of authority in the United States as to the measure of damages.

makes, by his contract, the purchase money the measure of the value of the title, and takes security by means of covenants in that amount and no more.[1] Nor is what some of the decisions call the equitable view of the case free from anomalies. If it is hard that a purchaser acting in good faith should lose his improvements, it is equally hard that a vendor acting also in good faith should pay for them. If a vendor, with the honest belief that an estate is his, sells it to a purchaser who with the same conviction improves it and enhances its value, and the real owner, immediately on discovering his title, sues for and recovers his estate, the profit and loss should, according to the view so taken, be adjusted by taking from the vendor much more than the consideration money he received, paying it to the purchaser, who will thereby be put in the same position he was in before, and letting the real owner retain and reap the benefit of all the improved value of the estate.[2] It is difficult to perceive the equity of this rule and courts of equity have not followed it. It is a familiar principle in equity that if the real owner of an estate invoke its aid for the recovery of the estate from one who acting in good faith has put improvements upon it, that aid shall be given to him only upon the terms that he will make due compensation to such innocent person to the extent of the benefits which will be received from those improvements, since he who seeks equity must do equity.[3]

§ 166. The practical application of the rule that the damages are measured by the value at the time of eviction may, moreover,

[1] Kinney *v* Watts, 14 Wend. (N. Y.) 41.

[2] The text was approved in Hertzog *v.* Hertzog, 34 Pa. 422. The following remarks were contained in the opinion delivered in the case of Willson *v.* Willson, 5 Foster, (N. H.) 236, about the same time as the text above was first written : "Let us suppose that after a sale the land increases in value, either by a rise in its price or by the improvements made upon it by the purchaser, a third person recovers the land by a paramount title, and the buyer sues the seller on the covenant in his deed. He recovers the value of the land at the time of the eviction. He loses nothing, the seller pays for the improvement, and the owner alone profits by the transaction. Now there may be no *mala fides* in any one of the parties, and the case supposed is not an extreme one. It will happen where the parties act in good faith, and the owner happens for a time to be ignorant of his legal rights. The other rule, which makes the consideration paid the measure of damages, has at least the recommendation of dividing the loss between the buyer and the seller ; for the seller loses the consideration, and the buyer loses the value of the improvements."

[3] Story's Eq. Jurisp. §§ 799, 1237 *et seq.* ; Sugd. on Vend. (14th ed.) ch. xxiii. § 29 *et seq.* See the remarks in Davis *v.* Smith, 5 Ga. 274 ; and Hertzog *v.* Hertzog, *ubi supra.*

work injustice in cases where the property may have depreciated in value, and in particular when that depreciation may have been owing to the neglect or other fault of the purchaser. In case he has received a covenant for seisin and a covenant for quiet enjoyment, he can of course sue upon either, or if he sue upon both he is allowed to have judgment entered upon either.[1] If the property is less valuable than when he purchased it, he elects to enter judgment upon the covenant for seisin, and receives the consideration money, which is far more than the property is then worth. If, however, it has increased in value, judgment is entered on the covenant for quiet enjoyment.

§ 167. The common law rule is, however, capable of being modified by circumstances in a court of law, or by a court of equity. If *the vendor* has made use of fraud or concealment, an action on the case in the nature of a writ of deceit may restore to the purchaser the value of all he has lost.[2] If *the purchaser* had, with knowledge of the defect, gone on with his improvements, his claim for their allowance will seem to rest upon less strong grounds than if he were ignorant,[3] notwithstanding he has taken the covenants for his protection against the defect. And if *the paramount owner* has lain by and seen these improvements go on without asserting his claim to the estate, this, though perhaps inadmissible as an equitable defence to an action for the mesne profits in a court of law, would certainly be recognized in a court of equity.[4]

[1] Sterling *v.* Peet, 14 Conn. 245; Stark *v.* Olney, 3 Ore. 88.

[2] *Supra*, § 159; Lee *v.* Dean, 3 Whart. (Pa.) 316; Carvill *v.* Jacks, 43 Ark. 439.

[3] Sugd. on Vend., 614.

[4] Green *v.* Biddle, 8 Wheat. (S. C. U. S.) 77; Lord Cawdor *v.* Lewis, 1 Younge & Coll. (Exch.) 427; Bright *v.* Boyd, 1 Story, (C. C. U. S.) 478, 493.

There may be a distinction, which, although it has been called "a nice and speculative one," (Pitcher *v.* Livingston, 4 Johns. (N. Y.) 1,) has been repeatedly applied to the somewhat analogous rule of damages upon admeasurement of a writ of dower, and this is between a rise in value owing to improvements made by the purchaser and an increase from other and adventitious circumstances.

By the common law, as stated by Coke (Co. Litt. 32 *a*), it seems that the wife was entitled to admeasurement of dower *as against the heir* according to the value of the land at the time of the dower being assigned to her, whether that value was greater or less than "in the time of the husband," and whether occasioned by improvements or not. But *as respects a purchaser* the rule was different, and "if feoffee improve by buildings, yet dower shall be as it was in the seisin of the husband," Year Book Mich. 17 Hen. III. (cited Fitz. Ab. Dower, 192); Pasch. 31 Edw. I. (cited Fitz. Ab. Voucher, 288); for which this reason is quoted from the Hale MS.: "For the heir is not bound to warrant except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he could recover in value, which is not reasonable." The cases cited from the Year Books appear to sustain this distinc-

§ 168. Upon the subject, however, of recompense in value to the purchaser for the loss of improvements which he has himself

tion, though not for the reason given by Lord Hale. The cases are these: "E., who was the wife of R., demands one third part of three acres of land with the appurtenances in E., as her dower, against W. And W. comes and says that he bought the land of her husband naked and unbuilt upon, and he built upon it; and he willingly allows to her her third part, saving the buildings to himself. And, therefore, she had her seisin, saving the said W. the houses built by him," etc. Mich. 17 Hen. III. "In a writ of dower the demand was for the third part of three acres, and of a mill, etc., where the tenant vouched to warranty; and when the vouchee came, he put forward a charter which stated that he ought to warrant a piece of land, etc. *Herle.* The demand is for a mill, and the charter speaks of a piece [of land] only; judgment if to warrant, etc. *The Tenant.* We have, since the gift, built a mill on that piece; judgment if he ought not to warrant, etc. And the case was that the woman's husband was seised of the piece [of land] when it was not built on. *Hengham.* If I enfeoff you of a vacant piece of land, and you afterwards build a castle on it, ought I to warrant to you the castle? (as though intimating the negative). But for all this you ought to have disclosed the circumstances when you vouched; therefore in respect of the mill let him be absolved, and let him warrant the remainder, etc. Note, that in a writ of dower, if the woman suffer the tenant to vouch to warranty where her husband died seised, the woman shall not recover damages," etc. Pasch. T., 31 Edw. I. See also Perkins, Dower, 328.

In America, a further distinction is taken in many of the States as regards the purchaser; and though in none of them is the wife allowed to receive any advantage by reason of improvements, yet there are many decisions which give her the benefit of the increase in value exclusive of improvements, such as would arise from improvements near the property or the general prosperity of that section of country. The leading case in support of this doctrine is Thompson *v.* Morrow, 5 Serg. & Rawle, (Pa.) 289, (there had been such a suggestion in the prior case in Massachusetts of Gore *v.* Brazier, 3 Mass. 523, but it was only a *dictum*,) where the land had received a twofold increase of value, first by reason of the purchaser's improvements, and, secondly, by the rapid advance of the city of Pittsburg. The case was twice elaborately argued, and Tilghman, C. J., who delivered the opinion of the court, referred to the cases cited from the Year Books, and observed that such of them as limited the wife to the value of the land at the time of its alienation were all cases where the purchaser had made improvements, and then remarked: "I have found no adjudged case in the Year Books confining the widow to the value at the time of the alienation by her husband, where the question did not arise on improvements made after the alienation. In our own State, it does not appear that the point now in question has been decided, though I have certainly considered the general understanding to be, that the widow should have the advantage of all increase of value not arising from improvements made after the alienation. Having considered all the authorities which bear upon this question, I feel myself at liberty to decide according to what appears to me to be the reason and the justice of the case, which is, that the widow shall take no advantage of improvements of any kind made by the purchaser, but, throwing those out of the question, she shall be endowed according to the value at the time her dower shall be assigned to her." The distinction thus taken has not only been adhered to in Pennsylvania in the subsequent cases of Benner *v.* Evans, 3 Pa. (old Pa., not Pa. St.) 456, and Shirtz *v.* Shirtz, 5 Watts, 258, but has been followed almost wherever it has been noticed. In Massachusetts, in the case of Powell *v.* Manufacturing Co., 3 Mason, (C. C. U. S.) 365, will be found an elaborate opinion of Judge Story, fully adopting the rule in Thompson *v.* Morrow, which has also

put upon the land, it may be said that under our modern system of conveyancing, and where the transaction is between vendor and purchaser in the usual acceptation of the term, it would seem difficult to rest the purchaser's right upon a very satisfactory basis. For in the absence of any fiduciary relation between the parties and of all fraud and concealment — in other words, where they are respectively selling and buying real estate and dealing at arm's length in so doing — the title is, or is supposed to be, examined by the purchaser, and the rule is *caveat emptor*. And hence —

1. If the defect of title be undiscovered by the purchaser, it is his own fault;

2. If the defect be known, and he take a covenant against it, of course he runs the chance of its consequences;

3. If, without examination of the title, he take covenants in lieu thereof, he equally runs the chances.

And in all of these cases he makes the improvements at his own risk, and in none of them would the hardship to the purchaser be so great as might be that to the seller of being ruined by his purchaser's improvements.

And it has been distinctly held that where the position of vendor and purchaser is the ordinary one, and the relation of the parties to each other ceases with the execution of the deed, under no circumstances can the question of the *motive* of the purchaser enter for the purpose of increasing the damages.[1]

been sustained in the States of Maine, Delaware, Indiana, Kentucky, and Ohio. Mosher *v.* Mosher, 15 Me. 372; Greer *v.* Tenant, 2 Harr. (Del.) 336; Smith *v.* Addleman, 5 Black. (Ind.) 406; Taylor *v.* Brodrick, 1 Dana, (Ky.) 348; Dunseth *v.* Bank of United States, 6 Ohio, 76. In New York, the cases of Dorchester *v.* Coventry, 11 Johns. 510, and Shaw *v.* White, 13 id. 179, were decided before Thompson *v.* Morrow, and Chancellor Kent, though leaving the point undecided in Hale *v.* James, 6 Johns. Ch. 258, has said in his Commentaries, "The better and more reasonable American doctrine upon this subject I apprehend to be, that the improved value of the land from which the widow is to be excluded in the assignment of dower, as against a purchaser of her husband, is that which has arisen from the actual labor and money of the owner, and not from that which has arisen from extrinsic or general causes." 4 Comm. 68. This note was more fully elaborated in the fourth edition of this treatise. But it must be distinctly observed, that although the cases upon covenants for title do not seem to refer particularly to this distinction, yet their decision has almost necessarily denied its application to that subject.

[1] Phillips *v.* Reichert, 17 Ind. 123. It was not so broadly stated in Batchelder *v.* Sturgis, 3 Cush. (Mass.) 204, and Wetherbee *v.* Bennett, 2 Allen, (Mass.) 430. Such a question may, under some circumstances, be matter for the jury for the purpose of determining what was the subject matter of the contract. See *supra*, p. 108.

§ 169. There would seem, however, to be two exceptions; one where the rule of *caveat emptor* did not and was not meant to apply, and the other where the intended improvement of the property forms part of the consideration between the parties; and to some extent these two classes of cases may at times run into each other.

And first, where the rule of *caveat emptor* was not meant to apply.

This includes that class of cases known as "common leases," in which, it is familiar, the tenant seldom if ever examines the title and would not in general be allowed to do so, and in which, from the earliest times to the present, certain covenants for title have been implied, not only from the words of leasing, but from the mere relation of landlord and tenant.[1] It is also familiar that in such leases it is common to stipulate that the premises shall only be used for certain purposes, and sometimes that the tenant shall make certain improvements. Yet it is believed that not until very recently was any exception allowed to the rule of the measure of damages under such circumstances in States where, under all the covenants, the damages were limited by the consideration money.

Thus in New York, it was formerly considered that the rent reserved was the just equivalent for the use of the premises, and as by the loss of the estate demised the rent ceased and the lessee was discharged from its payment, he could recover but nominal damages and such mesne profits as he might be liable to pay to the true owner, together with the costs incurred in defending the title;[2] and such was also held to be the law in Ohio.[3]

[1] Differing in this respect from the relation of vendor and purchaser. See *infra*, Ch. XII.

[2] Baldwin *v.* Munn, 2 Wend. 399; Kinney *v.* Watts, 14 id. 41; Moak *v.* Johnson, 1 Hill, 99; Kelly *v.* Dutch Church, 2 id. 105 (where, however, the covenants were contained in "a lease in fee"). In Kinney *v.* Watts, the court said: "A vendee, when he purchases, may insist upon special covenants, which will secure to him a perfect indemnity for any expenditures or improvements upon the premises in case of eviction; but if he takes the general covenants of warranty and quiet enjoyment, he has no right to complain that the law does not afford him full compensation for the loss and injury he has sustained by the eviction. If he resorts to an action upon this covenant, he must take the rule of damages which the law has established for a breach of it. A lease, where no purchase money is paid by the lessee, does not differ in principle, in this respect, from an ordinary conveyance in fee for a valuable pecuniary consideration. As the lessee has paid no purchase money, he can recover none back upon eviction; and in respect to the improvements which he may have made upon the premises and money expended upon them, he stands precisely upon the same footing with a purchaser who recovers nothing for improvements or expenditures, nor can a lessee, upon the ordinary covenant for quiet enjoyment."

[3] McAlpin *v.* Woodruff, 11 Ohio, 130. The lease in that case, however, was for

But it has been somewhat recently held in England, and that too without particularly drawing a distinction between common leases and those for a long term of years, that the balance between landlord and tenant was not to be struck by equalizing the payment of the rent and the loss of the term, but that the measure of damages was the value of the term to the lessee. Thus in the somewhat recent case of Williams *v.* Burrell,[1] where a lease for ninety-nine years was, after the death of the lessor, adjudged to be void as against the remainderman, it was held (though the point was not much discussed) that the lessee was entitled to recover from the executors of the lessor not only the costs of the action brought by the remainderman, together with the mesne profits therein recovered, but also the value of the term lost.

This was followed by the case of Lock *v.* Furze,[2] where the question as to the measure of damages received elaborate argument and consideration. A tenant in possession had in consideration of a premium of £400 obtained from his landlord a second lease, to commence when his old lease should expire; but before this time arrived the lessor died, and it being discovered that the second lease was an excessive execution of a power, the lessee, upon being notified that it would not be recognized by the parties in interest, secured the premises at a much higher rent, and then sued on the covenant for quiet enjoyment contained in the lease. It was said to be "the first time that the point had ever arisen in Westminster Hall,"[3] and the court held first, that the contract being executed by the delivery of the lease, the doctrine of Flureau *v.* Thornhill[4] did not apply; secondly, that as to damages there was no distinction between the loss of an *interesse termini* and an actual term in possession; and thirdly, that the measure of damages was, besides the £400 premium and the costs of preparing the void lease, the difference in value, as estimated by the jury upon the evidence, between the term professed to be granted to the plaintiff by his lessor and the seven years' term which he obtained from the rever-

ninety-nine years, which passes the line of what are usually called common leases.

[1] 1 Com. Bench, 402 (*infra*, Ch. XII.). "As to the mesne profits, and the value of the term lost," said Tindal, C. J., in delivering the opinion of the court, "the liability of the executors is too clear to require discussion. We think also that the defendants are bound to pay the costs of the plaintiff in defending the actions brought by the remainderman."

[2] 19 Com. Bench (N. S.), 96.

[3] Per Keating, J., p. 122.

[4] 2 W. Black. 1078 (*supra*, p. 221, n. 1).

sioner — in other words, the value of the term he had lost.[1] This decision was, on appeal, affirmed in the Exchequer Chamber,[2] and was followed in the later case in the Court of Exchequer of Rolph *v.* Crouch.[3]

[1] "It has been contended, on the part of the defendant," said Erle, C. J., "that the question is to be dealt with as if, instead of a covenant for quiet enjoyment, this had been a contract of sale, and to be governed by the rule of law which prevails in actions by vendee against vendor where the contract goes off by reason of the inability of the latter to make a good title, in which case he pays back the deposit and interest, and the expenses to which the vendee has been put in the investigation of the title, and not damages for the loss of the bargain. I am of opinion that that contention is not sustainable. It is a known rule of law as to contracts of sale. It is the settled law, founded upon numerous decided cases; and I believe that in the case of contracts for the sale of property the common convenience of mankind might justify it. Few vendors, when they offer property for sale, have any notion of the validity of their titles. But I think that rule is confined to contracts of sale, and that a line is to be drawn between a contract for the sale of land and a *conveyance* of an estate or interest therein. It is clear that if there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, as here, the lessee is entitled to recover all he has lost, that is, the value of the term. It was held in Williams *v.* Burrell, 1 Com. Bench, 402, that a lessee under a void lease, who had been ejected by the successor of his lessor, was entitled, in an action against the executors for breach of the covenant for quiet enjoyment contained in the lease, to recover the value of the term which he had lost. That is the only decided case on the point which was adduced before us. But it is contended on behalf of the defendant that, as this was a reversionary lease conveying only an *interesse termini*, the parties stand in the relative position of vendor and vendee, and not of covenantor and covenantee. I am of opinion, however, that that distinction cannot be maintained. The lease conveyed to the plaintiff an *interesse termini*, a term of twenty-one years. That interest vested in the plaintiff as a matter of right, so as to be assignable; and he was in possession. The covenant, therefore, is in perfect analogy to the case of an instrument conveying a present term and a present interest, under which the lessee has entered. That being so, Williams *v.* Burrell decides that the ordinary rule shall apply, viz. that a party breaking his covenant must pay such damages as are the proximate consequences of his breach of covenant." Some American authorities appearing in Sedgwick on Damages were quoted in the arguments and opinion, but the court considered their result as unsatisfactory.

[2] Lock *v.* Furze, L. R. 1 C. Pl. 441. The reasons, however, are hardly as conclusive as those given in the court below.

[3] L. R. 3 Exch. 44. The defendant leased certain premises to the plaintiff for seventeen years, with a covenant for quiet enjoyment, and the latter was subsequently evicted by one claiming under a paramount title, and it was held, in an action on the covenant, that the plaintiff was entitled to recover compensation for the loss of the land, together with the costs and expenses he had paid in defending his possession against the paramount title. Kelly, C. B., in delivering his judgment, said: "Secondly, with regard to the sum of £102, given for compensation for the loss of the land. It appears that the plaintiff had taken a lease of seventeen years from the defendant, with a covenant for quiet enjoyment during the term. The land which was leased has been taken away from him, and he has lost what it was and might reasonably have been expected to be worth to him. According to his own evidence, the land was worth £10 a year, and there seems no reason to doubt that he had made a fair estimate of the loss he had sustained, and that being so, the amount given him by the jury is, in my opinion,

In a recent case in New York,[1] the Court of Appeals, referring to the previous decisions in that State between vendor and purchaser, considered that the rule had not been very satisfactory to the courts in this country; that it had been relaxed or modified more or less to meet the injustice done by it to lessees in particular cases,[2] and had in England been "repudiated in two well-considered cases;"[3] and it was held, without drawing a distinction between an eviction by the landlord himself and eviction under paramount title, but largely resting the decision on the ground of the landlord's complicity in the eviction, that the measure of damages was the value of the unexpired term at the time of eviction, over and above the rent reserved.[4]

not excessive. Then, lastly, as to the conservatory. The plaintiff, relying on the performance by the defendant of his covenant, erected it for the better and more conveniently carrying on of his trade as a florist. He has lost the use of it, and I think that he is entitled to the sum given him by the jury for that loss."

[1] Mack *v.* Patchin, 42 N. Y. 167. The terms of the lease are not set forth in the report; but though the covenant for quiet enjoyment was said to be implied, the case did not decide that in all leases, without regard to form and language, there is an implied covenant for quiet enjoyment. Gallup *v.* Albany Railway, 7 Lans. (N. Y.) 471.

It should be remarked that in Mack *v.* Patchin, Lock *v.* Furze, and many of the cases cited in them and elsewhere the question of the measure of damages upon a breach of a covenant for title was, both in the arguments and in the opinions, to some extent blended with that upon a breach of an *executory* contract, as to which there has been much discussion and difference of decision.

[2] Citing Driggs *v.* Dwight, 17 Wend. 72; Giles *v.* O'Toole, 4 Barb. 261; Chatterton *v.* Fox, 5 Duer, 64; and Dean *v.* Roesler, 1 Hilton, 420. Of these, the first two cases were executory contracts, the third was the tortious eviction of the tenant by the landlord himself, and the last was a case of a failure to give possession.

[3] Williams *v.* Burrell, and Lock *v.* Furze, *supra*. The court was not then aware of the decision in Rolph *v.* Crouch.

[4] In the decision of this case by the Supreme Court at General Term (29 How. Pr. 20), the court, referring to the rule which measures the damages by the consideration money or the rent reserved, considered that in the case of "covenants for title in an executed conveyance, if the covenantor becomes himself an actor in ousting his grantee in breach of his covenant, he puts himself without the pale or protection of this arbitrary rule of damages, and becomes liable upon his broken covenant for the value of the estate he was instrumental in taking from his grantee," and rested the decision on the ground that it was "the active part which the defendant took to cause the eviction of the plaintiff from the demised premises that takes his case out of the rule of damage established for the protection of those who have acted in good faith, and places it under that rule which gives to the lessee the damages which he has suffered, *propter ipsam rem non habitam*." In the Court of Appeals, Erle, C. J., strongly relied in his opinion on the landlord's want of good faith, and Darwin Smith, J., premising that if admissible in practice he would be content to affirm the judgment upon the opinion below, also considered that "the plaintiff was clearly evicted from the premises by the act, procurement, and fault of the defendant."

In a subsequent case, where the lessee for a term of ten years with covenant for quiet enjoyment had, at the end of four years, yielded possession to a purchaser under proceedings to foreclose a prior mortgage executed by the lessor, no collusion or fraud was imputed to the latter, and the court held that out of the surplus proceeds of the sale the lessee should receive the value of the unexpired term.[1]

[1] Clarkson *v.* Skidmore, 46 N. Y. 297. "The lessee," said Rapallo, J., who delivered the opinion, "as between himself and his lessor, had a right to the possession and enjoyment of the whole of the premises during the residue of the term of his lease, being six years, subject only to the payment of the rent reserved in the lease and of the annual taxes which he had agreed to pay. This right had been conveyed to him by the lessor with a covenant of quiet enjoyment; and he had thus become entitled to the benefit, during that term, of the increase in value of the occupation of the premises, and to whatever difference existed between the value of the use thereof and the annual rent and taxes agreed to be paid therefor. He had, in fact, contributed to such increase of annual value, by expenditures for improvements made by him on the premises after the commencement of his term. To the extent of the value of the rights thus vested in the lessee, the lessor had, by giving the lease, diminished the value of his own estate. He had parted with and transferred to his lessee the right of occupation for a term of years, and remained entitled only to the rent reserved and the reversion subject to the mortgage. If the rent reserved in the lease was equal to or more than the annual value of the premises, then the estate of the lessee was manifestly worthless; but if on the contrary as appears to have been the fact, the annual value of the property was much greater than the rent reserved in the lease, the estate of the lessee was of importance, and a serious incumbrance on that of the lessor, and the lessee is entitled to receive its equivalent out of the surplus of the proceeds. Witnesses were introduced before the referee to prove the amount for which the premises were let after the sale and what was their fair rental; but the court held that such evidence should not be resorted to, but that the sum which the premises brought at the sale should be taken as the value of the fee, and interest thereon at six per cent, as the annual value of rental. The value of the fee may be an element to be taken into consideration in determining the value of the rental, but it cannot be uniformly adopted as the only legal basis of calculation, nor can a uniform percentage upon such value be fixed upon as a fair rental for all classes of property and under all circumstances. Unimproved lands are generally let even for long terms at a much lower rate in proportion to the value of the fee than buildings, which are constantly undergoing deterioration and decay. A tenant often erects improvements upon leased property at his own risk and expense, relying, and with safety, upon obtaining reimbursement by means of the increased annual value thus imparted to the property, which he will enjoy during his term. To award to him, as the equivalent of his term, simply interest upon the value of the fee of the land and improvements, would clearly do him injustice. While on the other hand, a tenant for a short term of unimproved city lots, which in their undeveloped condition would command but a trifling annual rent, would by being allowed interest on their actual value receive much more than he was entitled to, and the owner of the reversion would suffer. The value of the term must depend upon the circumstances of every individual case; the length of the term and conditions of the lease, the character of the property, its location, the readiness with which it may be let, the condition of the buildings, whether substantial and durable or requiring frequent repairs, the uniformity of rents in the neighborhood or their fluctuating character; in short, every material consideration which would enter

In Massachusetts, it is held that in cases of leases the rule of damages is the value of the lease,[1] but as in that State the measure of damages upon a breach of the covenant for quiet enjoyment is the value of the land at the time of eviction, the rule could hardly be otherwise.

In Pennsylvania, the question was presented in a very recent case of some hardship.[2] A lease for fifteen years of iron lands in consideration of a royalty contained a covenant by the lessee that he would forthwith erect approved machinery for working the mine, and a covenant by the lessor that the lessee should have full privilege to erect such machinery and necessary buildings, and to remove them at the end of the term. The lease contained the usual words "demise and let," but no express covenant for title or quiet enjoyment. The lessee took possession, erected the machinery, worked the mine, paid the royalty, and after about four years was evicted by title paramount to that of his lessor. In a subsequent action for mesne profits at the suit of the true owner against the lessor, the latter set off and was allowed the value of the improvements. Afterward, the lessee brought suit against the lessor upon the implied covenant for quiet enjoyment, but on the trial the court held that the measure of damages was the consideration paid, that the damages must be nominal,

into the mind of a purchaser of the term in judging what would be a fair price for it; and like other ordinary questions of value should be determined, as a matter of fact, upon the testimony of witnesses competent to speak upon the subject."

[1] Dexter *v.* Manley, 4 Cush. 14. The plaintiff had been the owner of a manufactory for making pails, which, together with all the tools and machinery therein, he sold to the defendant, who thereupon leased the premises to the plaintiff for a short term, reserving the privilege of running a turning-lathe and saw in the middle room, and instead of other rent the plaintiff agreed to do certain painting on the premises. The breach assigned of the implied covenant for quiet enjoyment (as to which see *supra*, § 155) was that the defendant had so used the machinery in the reserved room as to hinder the plaintiff in the manufacture of pails, and it was proved that, after the lease, the defendant commenced in this room the manufacture of laths, and that the sawing of the blocks of wood for that purpose rendered the machinery in the other parts of the house so unsteady as to prevent the turning of pails at all. The court below instructed the jury that where the lessee was entirely deprived of the use of the property leased, the rule of damages was *the value of the lease*, or what the property would fairly rent for; that on this subject the rent reserved, the amount of the business, and the profits of it, were proper evidence to be considered in estimating the damages; that there being only a partial disturbance of the plaintiff in the enjoyment of the lease, he was entitled only to a just proportion of the value of the lease according to the extent of the injury, and that the jury should take into consideration the fact that the property was leased with the restriction expressed; and, upon writ of error, this charge was held to be correct.

[2] Lanigan *v.* Kille, 97 Pa. 120.

and rejected the plaintiff's offer to show the value of the improvements, or that the lessor had received credit for them in the action for mesne profits, and this was affirmed on writ of error. The Supreme Court, conceding that as between lessor and lessee the rule had been recently altered in England,[1] yet drew a distinction between ordinary leases and those where the lessee sought to improve the premises, in which case the rule of *caveat emptor* applied;[2] it considered that the decision in Mack *v.* Patchin in New York rested on the ground of the lessor's fraud; it conceived

[1] "The eviction here," said Paxson, J., who delivered the opinion, "was by a paramount title. It is not the case of an eviction by a landlord in disaffirmance of his own act, or by a fraud perpetrated upon the tenant. It is important to bear this distinction in mind, as the measure of damages is different in the two classes of cases. It may be conceded to be settled law in England that the measure of damages for the head of an express covenant for quiet enjoyment is the value of the property at the time of the eviction [citing Williams *v.* Burrell, Lock *v.* Furze, and Rolph *v.* Crouch, *supra*]. . . . In this State it is settled that as between vendor and vendee, the measure of damages is the consideration paid. Bender *v.* Fromberger, 4 Dallas, 441, which expressly ruled the point, has never been questioned, but on the contrary has been followed in a number of later cases, which it is needless to cite. While the contrary doctrine has been asserted in a few of the States, the principle of Bender *v.* Fromberger has been recognized in a large majority of them and by the Supreme Court of the United States. . . . The question which immediately concerns us is whether the same rule applies between lessor and lessee. In England, as we have seen, it does not, and the measure of damages is the value of the property at the time of the eviction. Upon this point the authorities are meagre and by no means uniform. The true rule, however, would appear to be, that in an action by a lessee against his lessor for an eviction by a paramount title, the measure of damages is the consideration paid and such mesne profits as he has paid or may be liable for. The consideration for a lease is usually the rent reserved. If the tenant has enjoyed the possession of the demised premises, he has had the precise equivalent for the rent; if he has paid the rent in advance, he is entitled to recover it back in the form of damages for the eviction."

[2] Upon this point the court said: "There was evidently a mutual mistake in regard to the title. Why should the lessee throw the consequences of that mistake wholly upon the lessor? He was neither deceived nor misled by the latter. He probably examined the lessor's title, at least he might have done so, and the omission of such examination would be negligence under the circumstances. While it may be and doubtless is true that in ordinary short leases an examination of title is neither usual nor necessary, the same cannot be said in regard to leases of valuable ore lands, having fifteen years to run, and when from the necessities of the business costly improvements are required. The lessee of a small tenement has little occasion to concern himself about the title. If he is evicted the rent ceases, and that is the end of it. But in leases of the character of the one we are considering, title is of such supreme importance that no one but a very careless man would think of renting without a very careful examination. However careless a man may be as to title in ordinary leases, it is well to understand that when a lessee seeks to improve demised premises the rule of *caveat emptor* applies, and he would do well to see that his lessor has title; and if not satisfied therewith, he may further protect himself by apt words in an express covenant. There is no case in this State which is in conflict with this view."

that the court below had properly excluded the evidence as to the improvements, because although the lessee had bound himself to erect them, they were to be his at the end of the term,[1] and had properly excluded the evidence as to the credit which the lessor

[1] "The liability of a lessor under the implied covenant for quiet enjoyment for improvements made upon the demised premises by the lessee, may depend upon the circumstances. A tenant, who upon his own motion and for his own purposes erects a building or other improvement upon a leasehold, certainly cannot recover the value thereof from the lessor in event of an eviction. In such case, the rule of *caveat emptor* would apply. It was his own folly to build upon another's land. It was contended that the case in hand does not come within such rule, however, for the reason that the lessee covenanted with the lessor to erect the improvements in question. The lease does contain such a covenant, as to a portion of the improvements. It provides that the lessee shall 'forthwith procure and set up good and approved machinery to take out and work said ore,' and the lessor 'covenants and agrees to and with the said lessee that he shall have the full privilege of building houses and erecting all necessary machinery for developing, working, and taking out the ore upon the said tract; and that at the expiration of the hereby demised term, or in case the ore shall not be found in sufficient quantity upon the said tract, he shall have the right to take down and remove all buildings and machinery so put up or erected.' So far as the improvements which were put up by permission merely of the lessor are concerned, there can be no question. There was no obligation to put them up, and there can be no recovery. But it is said as to the machinery, there was a covenant to erect it, and therefore the lessee may recover its value in this proceeding. It will be observed that in no event was it to become the property of the lessor. The lessee was expressly authorized to remove it at the close of his term, or sooner, if ore shall not be found in sufficient quantity upon the tract. We are therefore unembarrassed with the question that would arise had the covenant required the improvements to be left on the premises at the expiration of the term. The improvements were primarily for the use and benefit of the lessee in his business. He leased the premises for the purpose of mining ore. This necessarily involved the use of the machinery and appliances usual in such business. Without them the tenant could not possibly have made the rent which he had covenanted to pay. The lessee having covenanted to work the ore, the covenant to erect the necessary machinery added nothing to its strength, for the reason that such erection was an essential incident of such mining. He might as well have covenanted to put on the mules, carts, picks, and tools ordinarily used in mining. The lessor had neither title nor interest in the machinery. He could not be said to have derived any benefit from it, except incidentally, as it enabled the lessee to pay the rent. The most that can be said is that it increased the lessor's security for his rent. The payment of the rent upon the days and times stipulated would have been so far an answer to a suit by the lessor against the lessee for a breach of the covenant of the latter to erect the machinery, that nominal damages only could have been recovered. If, then, the machinery was the property of the lessee, was erected for his own convenience in the prosecution of his business, it cannot be said to have been a part of the consideration paid for the lease; not any more than in the ordinary case of landlord and tenant, when the latter for his own convenience and without a covenant erects a building or puts up machinery for the purposes of trade. In either case, the lessor has increased security for his rent, to the exact amount that property of this description is placed upon the premises. . . . We are of opinion that the court below committed no error in excluding the offer to show the value of the improvements referred to in the first specification."

had received for them, because the offer was to show their value in place and not after their removal.[1]

§ 170. Secondly, where even in case of a sale, the intended improvement of the property forms part of the consideration between the parties.

Thus in certain parts of the United States, unimproved ground is frequently conveyed to a purchaser in fee, reserving to the vendor, as the entire consideration, an annual fee farm or ground rent which represents the value of the land, the purchaser covenanting that he will, for the purpose of securing to the vendor the rent so reserved, erect certain stipulated improvements.[2] In this class of cases, the improvements being directly within the contract of the parties and one of its inducements, it would seem that if the land thus improved were subsequently lost by reason of a defect of title or incumbrance created by the vendor, the damages should not be limited by the consideration,[3] but might with propriety be increased by the value of the improvements thus

[1] "The second specification alleges that the court erred in excluding plaintiff's offer to prove 'that the defendant, in an action against him for mesne profits by the claimant in the ejectment suit, fixed the value of said improvements at the sum of $9,600, and used the same as a set-off to the claim for the mesne profits, and was allowed for the same.' There was no error in rejecting this offer. Under no circumstances, as we view the case, would such evidence have been admissible. If we concede the right of the plaintiff to recover more than nominal damages, it is manifest he could only claim the value of the machinery after its removal, whereas the offer is to show its value in place. It is not to the purpose, that years afterwards the defendant, in an action against him for the mesne profits, succeeded in reducing damages by showing that the value of the property was enhanced by the improvements. He would have had the same right, had they been placed there by a stranger or even by a trespasser. His defence in that suit was that the plaintiff had gotten back his property increased in value; he was not using [the lessee's] property nor his own as a set-off, but merely reducing the plaintiff's claim to what *ex æquo et bono* he was entitled to recover. Had the suit been against Lanigan [the lessee] for the mesne profits, he could in like manner have set up the value of the improvements as a defence *pro tanto*. Had there been a verdict against him, I have no doubt, under all the authorities, he could have recovered it back in this proceeding as a part of his damages for the eviction. But he would have been limited to the amount of the verdict, not the verdict *plus* the improvements by which its amount had been reduced. As, however, the action for the mesne profits was against Kille [the lessor] Mr. Lanigan has no further concern in that matter, and it is referred to only by way of illustration."

[2] As is the case in many parts of Pennsylvania, particularly in the cities of Philadelphia, Lancaster, and Pittsburg, and, it is believed, in certain parts of New York.

[3] Which would be merely the rent reserved; the loss of the land by paramount title would be, of course, a suspension of the rent, as in the case of landlord and tenant, but beyond this the purchaser would lose all the improvements which, by the very terms of the sale, he had erected.

made; and if there could be any doubt as to the liability of the vendor to this extent in case the defect or incumbrance were not created by himself, although within the covenants he might have given, there would seem to be none where the loss was the consequence of his own act.[1]

§ 171. Although this distinction may be superfluous in the case of a "common lease," which is within the exception last considered,[2] or wherever the damages are measured by the value at eviction,[3] yet its importance as regards other than "common leases" in States where the consideration is the measure of damages is shown by the Pennsylvania case just referred to,[4] in which it was held that as the improvements, though covenanted for in the lease, were not strictly part of the consideration, the tenant upon eviction was not entitled to recover their value.

§ 172. The question of the measure of damages relatively to increased value of the land having been thus considered, we return to the class of cases which decide that upon the covenants for seisin and of right to convey the damages are measured by the consideration named in the deed. This has been taken from

[1] There is no direct authority for this suggestion, but it is quoted with approval in Field on Damages, § 497, and 2 Sutherland on Damages, 259, and since it was made, the following has been said by an English writer: "I conceive that the doctrine laid down by Kent, C. J., in Staats *v.* Ten Eyck, 3 Caines, (N. Y.) 111, is clearly the equitable rule, where the improvements arise from causes of an entirely collateral nature, such as the growth of a town, the formation of a railway, or the like. The occupier has had all the benefit of this increased value, so long as it lasted, without paying anything for it. Even supposing that he had sold again after the land had risen in value, and been forced to pay back to his purchaser according to that additional value, still he would be only repaying money which he had actually received, and would on the same principle have a right to call on his vendor to return the sum which he had received, and no more. But the same obvious equity seems by no means to exist when the additional value arises from the outlay of the plaintiff's own capital upon the land. No doubt cases might be put in which a claim for damages on this account would be clearly inadmissible; as, for instance, if a person bought a moor or a mountain for shooting over, and chose to reclaim the one, or build a mansion with pleasure-grounds upon the other. But suppose he purchased building ground, at so much per foot, in London or Manchester, for the express object of building, ought he not to be repaid for money laid out in this way, the benefit of which is seised by a stranger? In this case the damage incurred is the direct result of the breach of contract, and a result which must have been contemplated by the party entering into the covenant. Probably this will be found to be the true ground of distinction, and that every case must be decided upon its own merits, according as the improvements were the fair consequence of the contract of sale or not." Mayne on Damages (3d ed.), 182; see also Dart on Vend. (5th ed.) 793.

[2] *Supra*, § 169.

[3] *Supra*, § 163.

[4] Lanigan *v.* Kille, *supra*, p. 239 *et seq.*

analogy to the common law warranty, under which, as has been seen,[1] the recompense in value was as of the time of the warranty made, and this value has since been deemed to be *prima facie* fixed by the expressed consideration, as that was the agreement of the parties at the time of sale.[2]

§ 173. Neither the vendor nor the purchaser is, however, according to the weight of authority, concluded by the consideration clause.

It is true that in England there have been cases which are considered to decide that "where the damages are to be calculated upon the basis of the purchase money, its amount, if stated in the deed of conveyance, cannot be contradicted by parol evidence;"[3] but even there such a rule can hardly be said to have a general application.[4]

On this side of the Atlantic it may be considered as settled that although (apart from the question of fraud) evidence to contradict or vary the consideration clause is inadmissible if offered to defeat the conveyance as such (as for example by showing it void because of want of consideration[5]), yet that for any purpose short of affecting the title this clause is not conclusive, but only *prima facie* evidence of the amount therein named.[6]

[1] *Supra*, § 157.

[2] Marston *v.* Hobbs, 2 Mass. 433; Smith *v.* Strong, 14 Pick. (Mass.) 128; Tapley *v.* Lebeaume, 1 Mo. 550; Cummins *v.* Kennedy, 3 Litt. (Ky.) 118; Wilson *v.* Forbes, 2 Dev. (N. C.) 30.

[3] Mayne on Damages (3d ed.), 184; Rowntree *v.* Jacob, 2 Taunt. 141; Lampon *v.* Corke, 5 Barn. & Ald. 606; Baker *v.* Dewey, 1 Barn. & Cress. 704. None of these cases, however, directly support the proposition.

[4] Thus in Rolph *v.* Crouch, L. R. 3 Exch. 44, cited *supra*, p. 236, there were two distinct leases of adjoining premises, one at a peppercorn rent, and the other at £80; and the tenant having been evicted from both, the court upon the question of damages considered that though the rents were separated in the lease, the two properties were let together, and that the value of the one was considered in the rent paid for the other, it being in fact one transaction.

[5] As in Wilt *v.* Franklin, 1 Binn. (Pa.) 502; Farrington *v.* Barr, 36 N. H. 89; Hurn *v.* Soper, 6 Harr. & Johns. (Md.) 276; Betts *v.* Union Bank, 1 Harr. & Gill, (Md.) 175; Claggett *v.* Hall, 9 Gill & Johns. (Md.) 91; Cole *v.* Albers, 1 Gill, (Md.) 423; Elysville Man. Co. *v.* Okisko Co., 1 Md. Ch. Dec. 392; Henderson *v.* Henderson, 13 Mo. 152. In the case last cited it was held that evidence was not admissible, in an action brought by a son against his father's executors on a covenant against incumbrances contained in a deed given by the latter to the former, to show that the consideration therein named was not paid, but that the deed was executed for a certain purpose, on the fulfilment of which the title was to have been reconveyed. But to carry the rule to this extent would obviously be to shut out evidence of fraud, and in Parke *v.* Chadwick, 8 Watts & Serg. (Pa.) 96, the law was held to be otherwise, upon facts very similar to those in Henderson *v.* Henderson.

[6] Meeker *v.* Meeker, 16 Conn. 383;

§ 174. Hence, it is held that in an action on the covenant for seisin parol evidence is admissible on the part of the plaintiff to show the actual consideration to have been greater than that expressed in the deed, for the purpose of increasing the damages;[1] and on the other hand equally admissible on the part of the defendant to show the consideration less, for the purpose of diminishing them.[2] So it has been held admissible for the defendant

Gulley *v.* Grubbs, 1 J. J. Marsh. (Ky.) 388; Burbank *v.* Gould, 15 Me. 118; Higdon *v.* Thomas, 1 Harr. & Gill, (Md.) 139; Wolfe *v.* Hauver, 1 Gill, (Md.) 84; Bullard *v.* Briggs, 7 Pick. (Mass.) 533; Wade *v.* Merwin, 11 id. 288; Clapp *v.* Tirrell, 20 id. 247; Dexter *v.* Manley, 4 Cush. (Mass.) 26; McCrea *v.* Purmort, 16 Wend. (N. Y.) 460; Bingham *v.* Weiderwax, 1 Comst. (N. Y.) 509; Hartley *v.* McAnulty, 4 Yeates, (Pa.) 95; Hayden *v.* Mentzner, 10 Serg. & Rawle, (Pa.) 329; Watson *v.* Blaine, 12 id. 131; Jack *v.* Dougherty, 3 Watts, (Pa.) 151 (where the language of Parker, C. J., in Bullard *v.* Briggs, *supra*, is approvingly quoted); Monahan *v.* Colgin, 4 Watts, (Pa.) 436; Strawbridge *v.* Cartledge, 7 Watts & Serg. (Pa.) 399; Bolton *v.* Johns, 5 Pa. 145; Curry *v.* Lyles, 2 Hill, (S. C.) 404; Garrett *v.* Stuart, 1 McCord, (S. C.) 514; Jones *v.* Ward, 10 Yerg. (Tenn.) 160; Park *v.* Cheek, 2 Head, (Tenn.) 451; Duval *v.* Bibb, 4 Hen. & Munf. (Va.) 113; Harvey *v.* Alexander, 1 Rand. (Va.) 219; Wilson *v.* Shelton, 9 Leigh, (Va.) 343; Click *v.* Green, 77 Va. 827; Beach *v.* Packard, 10 Verm. 96. In other words, the only effect of the consideration clause is to estop the grantor from alleging that the deed was executed without consideration, and that for every other purpose it is open to explanation, since the origin and purpose of the acknowledgment in a deed was merely to prevent a resulting trust to the grantor, the clause being merely formal or nominal, and not designed to fix conclusively the amount either paid or to be paid. Belden *v.* Seymour, 8 Conn. 312.

There are some earlier cases, and even some *dicta* in later ones, which appear to lean the other way (Schemerhorn *v.* Vanderheyden, 1 Johns. (N.Y.) 139; Howe *v.* Barker, 3 id. 508; Maigley *v.* Hauer, 7 id. 342; Steele *v.* Adams, 1 Greenl. (Me.) 1; Clark *v.* McAnulty, 3 Serg. & Rawle, (Pa.) 367); but the weight of American authority has settled the principle as stated in the text. Bronson, J., in Greenvault *v.* Davis, 4 Hill, (N. Y.) 643, seemed to be of opinion that when the deed contained no covenants but those for seisin or warranty, the consideration was inserted for the purpose of fixing the amount of damages in case of a loss of the estate; "at least such is my present impression, though my brethren are inclined to a different conclusion. But it is not now necessary to decide the question." "I submit, however," says Mr. Sedgwick in quoting this passage, "that any distinction as to the purpose for which the parol proof is admitted cannot be maintained. If good for one end, it must be good as to all. It would be a solecism for the tribunal to admit evidence to influence their minds as to one result and to exclude it as to another. If a fact be established, all its legitimate results must follow, whether as to rights or remedies; and in the sister States of the Union it seems to be generally held that parol proof is admissible as to the quantum of consideration paid." 1 Sedgwick on Damages (7th ed.), 342. These remarks must be taken subject to the qualification above referred to, that such evidence is inadmissible if it goes to destroy the effect of the deed as a conveyance.

[1] Belden *v.* Seymour, 8 Conn. 304; Dexter *v.* Manley, 4 Cush. (Mass.) 26; Guinotte *v.* Chouteau, 34 Mo. 154.

[2] Martin *v.* Gordon, 24 Ga. 535; Fields *v.* Willingham, 49 id. 344; Swafford *v.* Whipple, 3 G. Greene, (Io.) 267; Williamson *v.* Test, 24 Io. 139 (where the lot was paid for by a watch); Blood *v.* Wilkins, 43 id. 567; Wachendorf *v.* Lancaster, 66 id. 458; Harlow *v.* Thomas, 15

to show, *in reduction of damages*, that the part to which there was no title was included in the deed by mistake, and that no consideration was paid for it,[1] though it is clear that such evidence is admissible solely in mitigation of damages, and not for the purpose of negativing a breach of the covenant;[2] and where, in a somewhat recent case, the defendant offered to prove that the plaintiff agreed to take the premises subject to a certain mortgage, which formed the whole consideration of the conveyance, this evidence was held to have been properly rejected.[3] And so

Pick. (Mass.) 70; Moore *v.* McKie, 5 Sm. & M. (Miss.) 238; Morse *v.* Shattuck, 4 N. H. 229; Bingham *v.* Weiderwax, 1 Comst. (N. Y.) 514; Vail *v.* Junction R. R. Co., 1 Cin. S. C. (Ohio) 571; Patrick *v.* Leach, 1 McCr. (C. C. U. S.) 250; Cox *v.* Henry, 32 Pa. 19. In Yelton *v.* Hawkins, 2 J. J. Marsh. (Ky.) 2, it seems to have been thought that, where a consideration had been by mistake erroneously inserted as £56, instead of £43, evidence would not have been admissible to prove this as a defence at law, but that relief could be had in equity. In Coger *v.* McGee, 2 Bibb, (Ky.) 321, equity interfered to reform a conveyance which contained a limited covenant of warranty, upon evidence that the grantee, at the time of its execution, objected to such a covenant, but yielded upon being assured by the draftsman and others that it meant an agreement to refund the consideration money and interest, which was rather a novel view to have taken of the peculiarity of a limited covenant.

[1] Leland *v.* Stone, 10 Mass. 463; Barns *v.* Learned, 5 N. H. 264; Nutting *v.* Herbert, 35 id. 127. But parol evidence that the plaintiff knew that the defendant had no title to part of the land described has been held inadmissible for the purpose of showing that no consideration was paid for that part. Wadhams *v.* Innes, 4 Bradw. (Ill.) 642.

[2] Nutting *v.* Herbert, 35 N. H. 264. "The testimony could not be received to contradict or vary the deed by showing that the house and land owned and occupied by Merrill were not intended or understood to be included in the conveyance, for the purpose and with the result of negativing any breach of the covenants of seisin and good right to convey, for which, in part at least, they seem to have been offered. But they were admissible on the question of damages. . . . Whatever evidence, therefore, tended to show the consideration actually paid for the premises before granted to Merrill, or to show that no consideration was paid for them, for the reason that it was known and understood by the parties that they were not to pass by the conveyance, was competent and admissible on the question of damages, although inadmissible upon the issue raised by the plea of *omnia performant*. If the jury should find that nothing was paid for the Merrill place, although it is clearly included within the deed, but that both parties knew and understood it to have been previously sold; that, in fact, it was included in the deed by mistake or through inadvertence, the plaintiff would be entitled to nominal damages only." Per Fowler, J.

[3] Eastabrook *v.* Smith, 6 Gray, (Mass.) 578. "If, as the defendant offered to prove at the trial, the plaintiff 'agreed to take the premises subject to said mortgage,' then that agreement should have appeared in some way in the deed, or in some other written instrument. It was as easy to except the claim on the outstanding mortgage from the covenant of warranty as from the covenant against incumbrances, if such was the understanding of the parties. But nothing is clearer than that the parol evidence which was offered to control the covenant in the deed was inadmissible." The point that parol evidence is inadmissible to prove that a certain incumbrance, not expressly excepted

where a trustee was held personally liable on his covenants,[1] it was not allowed to be shown that the consideration was not wholly or in part received by him or for his use.[2]

§ 175. In cases where there is *no* consideration named in the deed, the measure of damages must be obtained from other evidence as to the value of the land;[3] and where, as must sometimes be the case, the consideration does not move directly from the grantee to the grantor, but the conveyance of the land is the result of a negotiation in which a third party is concerned, the real consideration which moved from the grantee — that which he actually parted with in order to acquire the title of the grantor — must be sought from all the circumstances of the case, and the damages measured accordingly.[4] And where the defendant was a

from the operation of the covenants, was agreed to be so considered by the parties at the time, was also decided in Townsend *v.* Weld, 8 Mass. 146; Porter *v.* Noyes, 2 Greenl. (Me.) 22; Donnell *v.* Thompson, 1 Fairf. (Me.) 177; Collingwood *v.* Irwin, 3 Watts, (Pa.) 309; Suydam *v.* Jones, 10 Wend. (N. Y.) 184; see *supra*, § 78 *et seq.*; and of course the scope of a covenant of warranty can neither be enlarged nor restricted by oral testimony of simultaneous or prior agreements. Raymond *v.* Raymond, 10 Cush. (Mass.) 141; Faucett *v.* Currier, 109 Mass. 79; s. c. 115 id. 20; Bigham *v.* Bigham, 57 Tex. 238; Rinehart *v.* Rinehart, 91 Ind. 89.

[1] As to this, see *supra*, § 36.

[2] Bloom *v.* Wolfe, 50 Io. 286.

[3] Smith *v.* Strong, 14 Pick. (Mass.) 128. It will be remembered that the remedy upon the ancient warranty was the recovery of another feud of equal value, and it was in analogy to this that when a pecuniary recompense was substituted the consideration named in the deed was taken to be *prima facie* evidence of the value of the land to the purchaser.

[4] A good illustration of this will be found in Byrnes *v.* Rich, 5 Gray, (Mass.) 518. "The rule of damages," said Shaw, C. J., who delivered the opinion, "is perfectly well settled in this Commonwealth; it is the amount of the consideration actually paid by the grantee to the grantor with interest from the time of the payment. We say paid by the grantee to the grantor, which is the most common case. But there may be anomalous cases, especially where it is not a direct negotiation between the parties to the deed, but where, in a negotiation between two, there is a stipulation by one with the other, upon a certain consideration, to execute a deed and convey certain land to a third person, and a deed is given accordingly. Such appears by the evidence to have been the present case. The plaintiff agreed to receive of one Leighton a certain lot of land in Melrose, in full satisfaction and discharge of a debt. Leighton then agreed with the defendant to purchase of him the same land, and then requested the defendant to make the deed direct to the plaintiff, with warranty; he executed it accordingly, upon a large nominal consideration expressed, and handed it to Leighton, who delivered it to the plaintiff in satisfaction of his debt. Then what was the actual consideration as between the plaintiff and defendant? It is very clear that the consideration expressed in the deed is no criterion; the actual consideration may be always inquired into by evidence *aliunde*. Nor is it the sum agreed to be paid to the defendant by Leighton; to that the plaintiff was a stranger. Nor is it the nominal amount of the note which the plaintiff agreed to surrender and release to Leighton, as the consideration to be by him paid for the land. That may have been a security of little value; no evidence of its value was

stranger to the consideration except as to that part which he received upon the subsequent execution of the deed, it was held that the measure was the value of the land at the time of the conveyance, or, at the plaintiff's election, the amount actually received by the defendant.[1]

§ 176. The essential difference as to the right of action and the pleadings which exists between a covenant for seisin and a covenant for quiet enjoyment has already been pointed out. Upon the former, it is considered that the covenant is broken as soon as made, that the right of action accrues at once, and in declaring for its breach it is sufficient to negative the words of the covenant.[2] Upon the latter, no breach accrues until an eviction, actual or constructive, and in declaring, the plaintiff must set forth the manner of the breach with more or less particularity, and the damages are, of course, (within the rules to be hereafter considered,) measured, as in other cases, by the loss actually sustained. But it may well be that although a covenant for seisin may be technically broken, and upon suit brought upon it the right to damages upon the pleadings and proof may be perfect, yet that so far as actual loss to the purchaser is concerned he may be in the same condition as when he first received the covenant. The question of how the damages may then be measured has, by some, been considered to be an embarrassing one.[3] On the one hand, it

given; and, besides, to that part of the transaction the defendant was a stranger. It seems, therefore, to be a case to which the ordinary general rule cannot apply, and which must be determined according to its particular circumstances, upon the general principle applicable to breaches of contracts; the party shall recover a sum in damages which will be a compensation for his loss. The case is very similar in principle, and considerably so in its facts, to that of Smith *v.* Strong, 14 Pick. (Mass.) 128. It was there laid down, that, in such case, the measure of damages is the consideration paid, with interest from the date of the deed; but if the consideration cannot be ascertained, the value of the land at the time of the intended conveyance, with interest from the date of the deed, will be the measure of damages. It appears to us that this rule will afford indemnity in the present case. If the failure of title extended to the whole of the land, then the entire value of the land is to be the measure; if to a part only, and the plaintiff does not tender a reconveyance of the part upon which the conveyance operated to give title to the grantee, then the value of the part, the title to which failed, with interest, will be taken as the measure of damages." See the case of Lawless *v.* Collier, 19 Mo. 480, referred to *infra*.

[1] Staples *v.* Dean, 114 Mass. 125.

[2] *Supra*, 61.

[3] It was remarked in Dane's Abridgment (vol. iv. p. 340), "In respect to the amount of damages, if the grantee has been turned out of, and lost the land, there is no question but that the said consideration and interest is the true amount; but if he remains in possession of the land, and has not been ousted or evicted, it is an important question, if he shall recover

may be urged that it would be obviously inequitable that the purchaser should be entitled to have his damages measured by the consideration money, and while receiving them still retain the land for whose loss they were intended as an equivalent,[1] and on the other, that if the breach of the covenant is, as the American cases say, "single, entire, and perfect in the first instance," [2] and

his said consideration money and interest, while he so retains the land." This is the difficulty which has been suggested as the cause of holding, in some of the New England States, that the covenant for seisin is not broken at all if an actual seisin had passed to the purchaser. See *supra*, § 42 *et seq.* But as has been remarked, the doctrine goes beyond the exigencies which may have given rise to it; for the purchaser has then no remedy if an actual seisin has been transferred to him, even though he should afterwards lose the land.

[1] Haynes *v.* White, 55 Cal. 38; Hartford Ore Co. *v.* Miller, 41 Conn. 112; Boon *v.* McHenry, 55 Io. 202; Hencke *v.* Johnson, 62 id. 555; Collier *v.* Gamble, 10 Mo. 472; Lawless *v.* Collier, 19 id. 480; Cockrell *v.* Proctor, 65 id. 41; Conklin *v.* Hannibal & St. Joseph R. R. Co., id. 533; Farmers' Bank *v.* Glenn, 68 N. C. 35. These remarks in the text have often been quoted with approbation, but their application has sometimes been limited to cases where the purchaser has set up the defence of the broken covenant in a suit by his grantor to recover unpaid money; Small *v.* Reeves, 14 Ind. 164; Hacker *v.* Blake, 17 Ind. 97; Nosler *v.* Hunt, 18 Io. 217; and as to this, as has been already said, the rule is almost a uniform one, that if no *actual* damage has happened the purchaser must pay the purchase money and rely upon his covenant for future protection. And it is certainly better to lean towards this extreme, than to open such a latitude of defence and temptation to set up outstanding titles to which a contrary course of decision would tend. See *infra*, Ch. XIV. Cases in which a contrary doctrine is asserted will, on examination, be found to have been decided not so much upon general principles as the application of local legislation. Thus in Akerly *v.* Vilas, 21 Wis. 109, it was said: "Before the code, it was well settled that, in suits brought to foreclose mortgages for the purchase money, in which the mortgagor, being in possession of the lands, set up a partial failure of title as a defence, without averring an actual eviction or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. Van Waggoner *v.* M'Ewen, 1 Green Ch. (N. J.) 412; Abbott *v.* Allen, 2 Johns. Ch. (N. Y.) 519; Simpson *v.* Hawkins, 1 Dana, (Ky.) 305. Courts of equity declined to go into such defences, because titles to land could better be tried by actions at law, and the damages were often unliquidated and not the subject of set-off, and also because the possession of the defendant being undisturbed must ripen into a perfect title. But the code allows a counter claim to be set up in an answer to a foreclosure action as well as in others. It is no objection to such counter claim or claims that the damages are unliquidated, or that the claims are legal, or equitable, or both; for claim, legal or equitable, for liquidated and unliquidated damages on contract, may all be set up in the same answer. The defendant, who sets up by way of counter claim a cause of action based upon the covenants in a deed, is entitled to recover the same damages as he would have recovered if he had brought a separate action on those covenants. If he declares upon the covenant of seisin and alleges breaches, it is no defence to his claim that he is in undisturbed possession of the premises. He has a right to recover his actual damages, whatever they may be, the same as in a suit at law before the code. Walker *v.* Wilson, 13 Wis. 522; Hall *v.* Gale, 14 id. 54." Noonan *v.* Ilsley, 21 id. 138; s. c. 22 id. 27; Smith *v.* Hughes, 50 id. 620.

[2] See *infra*, Ch. X.

only nominal damages are given because there has been no actual loss, the covenant has spent its force, for such a recovery could of course be pleaded in bar of any subsequent action, and whatever difference, therefore, there might be in theory between a covenant for seisin and a covenant for quiet enjoyment, there would be little in practice.

§ 177. In England, this difficulty does not occur to the same extent, as the cases, perhaps rather forcing the conclusion, consider the covenant for seisin a continuing one, on which recoveries can successively be had by the purchaser or his assigns as often as damage is sustained.[1]

§ 178. If we go to the source of the covenants for title — the common law warranty — we find that it assured not only the consequences of a defective title but the title itself, and that there were peculiar provisions, unknown to the modern system of law, by which the rights of both parties — he who gave and he who received the warranty — were sought to be preserved.[2] And the

[1] See *infra*, Ch. X. This is true wherever the English doctrine prevails. Boon *v.* McHenry, 55 Io. 202. But even in England the question would seem to be considered as not free from difficulty. Thus a late writer says: "Actions may be brought for breach of the covenant for title and authority to convey, before any eviction or disturbance of the plaintiff has taken place. Kingdon *v.* Nottle, 4 Maule & Selw. 53; Ex parte Elmes, 33 L. J. Bkcy. 23. What ought to be the amount of damages under such circumstances? It is plain that the conveyance may, notwithstanding the defect of title, pass something to the covenantee, or it may in fact pass nothing at all. . . . Where the plaintiff has never got into possession of the land, and in consequence of the want of title never can, the [consideration money] is clearly the proper measure of damages. The action on the covenant then comes in place of an action for money had and received, on failure of consideration. Baber *v.* Harris, 9 Adolph. & Ellis, 532. But it may be doubted whether the same rule would hold good, as a matter of law, where the plaintiff had got into possession, and in fact continued so still. A case may be easily imagined, and indeed constantly occurs, in which there is such a defect in the title as makes it strictly unsalable, though there is little or no chance of the occupant ever being turned out. In such a case it would not be fair to allow the whole purchase money to be recovered. The vendor has not given a salable title as he engaged, but he has given up his own possessory title, which was worth something to him, and is worth something to the purchaser. It is clear that if he were forced to refund the entire purchase money, the estate would not revert to him, because, as against him, the title would still be in his vendee. The covenant, it will be observed, is a continuing one; Kingdon *v.* Nottle; and therefore may be sued upon from time to time, according as fresh damage arises. The fair rule then would be to give the plaintiff such damages as will compensate him for the defective quality of his title. This was the course adopted in the case last cited, where the special damage laid was that the lands were thereby of less value to the owner, and that he was hindered from selling them so advantageously." Mayne on Damages (3d ed.), 177, 179.

[2] See *supra*, Ch. I. p. 13, as to the judgment *pro loco et tempore*, etc.

very fact that the modern covenants, which were certainly meant to be at least as effective as the warranty which they superseded, were divided as they were into covenants which should assure the title and covenants which should indemnify against loss, would seem to show that their difference in effect to a purchaser was meant to be real rather than nominal.

If, indeed, the possession of the purchaser has remained undisturbed until it has ripened into a valid title under the statute of limitations, it has been held that although the covenant may have been technically broken, yet only nominal damages can be recovered.[1] Apart from this, taking the ordinary case of a covenant for seisin technically broken when it was made, and the action brought upon it while the possession was still undisturbed, it is well settled that a recovery even of nominal damages can, as has been said, be pleaded in bar of any subsequent action.[2] Hence, under a rule which would allow only nominal damages while the possession is undisturbed, the only practical difference between the covenant for seisin and a covenant for quiet enjoyment would be that while in an action on the latter it would not, as has been seen, be considered an eviction for the covenantee to purchase the paramount title unless it had been adversarily asserted against him,[3] yet in an action on the covenant for seisin the adversary assertion of the title would be immaterial, provided it were really a paramount title, and the price *bona fide* paid for it did not exceed the consideration money.

The question, therefore, resolves itself into whether a purchaser has the right, by an action on the covenant for seisin, to consider

[1] Pate *v.* Mitchell, 23 Ark. 591; Wilson *v.* Forbes, 2 Dev. (N. C.) 30, approved in Cowan *v.* Silliman, 4 id. 47; Somerville *v.* Hamilton, 4 Wheat. (S. C. U. S.) 230; Garfield *v.* Williams, 3 Verm. 328.

[2] Donnell *v.* Thompson, 1 Fairf. (Me.) 174; Nosler *v.* Hunt, 18 Io. 217.

The general principles of the law of estoppel, as applied to judgments, were clearly stated by Lord Ellenborough in Outram *v.* Morewood, 3 East, 346; and see Judge Hare's note to the Duchess of Kingston's case, 2 Smith's Leading Cases. In Markham *v.* Middleton, 2 Strange, 1259, the defendant had suffered judgment to go by default, but when the plaintiff went before the jury of inquiry for damages, he failed in his proof, and the damages were assessed at one penny. Under the circumstances of the case, the court ordered a new writ of inquiry on payment of costs; but it is evident that in another action the plaintiff would have been barred by that verdict if it had stood. Seddon *v.* Tutop, 6 Term, 609; Godson *v.* Smith, 2 J. B. Moore, 162. The plaintiff's proper course, where he perceives that his action must result in nominal damages, is to discontinue or suffer a nonsuit, which will not, of course, affect his right to a subsequent recovery. Harris *v.* Newell, 8 Mass. 263.

[3] *Supra*, § 150.

the contract as rescinded, whereby he can recover back his entire consideration money, and this question involves others of some nicety of distinction.

§ 179. There is a class of cases which hold that where a conveyance is made containing certain of the covenants for title, and the vendor afterwards acquires an estate which is within the scope of those covenants, such after-acquired estate immediately inures to the purchaser or his assigns by the operation of the doctrine of estoppel. In another part of this treatise it is attempted to show that this doctrine is both unsound in principle and in its universal application sometimes unjust in its practical results.[1] But however this may be, the doctrine itself, though apparently upon the wane as to judicial support, and, if retained, retained because it is supposed to have become a rule of property, seems to have largely passed from the region of decision into that of legislative enactment, and as such is established in many of our States.

As its consequence, it has been held in a few cases that although the purchaser's covenant for seisin may be broken, yet if the vendor have subsequently acquired the paramount title, which by virtue of that or other covenants in the deed inures by estoppel to the purchaser, this may be given in evidence in mitigation of damages, whose amount will then be but nominal;[2] in other words, such a

[1] *Infra*, Ch. XI.

[2] Baxter *v.* Bradbury, 20 Me. 260 (see the remarks on this case, *infra*, Ch. XI.); Farmers' Bank *v.* Glenn, 68 N. C. 35; Reese *v.* Smith, 12 Mo. 344; King *v.* Gilson, 32 Ill. 355; Knowles *v.* Kennedy, 82 Pa. 445. This was thus plainly stated in Burke *v.* Beveridge, 15 Minn. 208: "Though by the breach of the covenants in question [for seisin and good right to convey], as thereby the title wholly fails, the law restores to the plaintiff the consideration paid, with interest; yet if by virtue of another covenant in the same deed, also intended to secure to her the subject matter of the conveyance, she has obtained that seisin, it would be altogether inequitable that she should have that seisin and also the consideration paid for it; that is to say, that if there exist facts which would render inequitable the application of the rule that such covenants, if broken at all, are broken as soon as made, and the purchaser's right of action to recover back the consideration is then perfect, such facts are to be taken into consideration by the jury, not as a bar to the action, but in mitigation of damages. The burden, however, is on the defendant to show the existence of such facts." This rule has been sometimes sought to be carried too far, and to entitle *the defendant* to a verdict. Thus in McCarty *v.* Leggett, 3 Hill, (N. Y.) 134, the defendant having acquired title since the conveyance, it was ruled at the trial that this subsequently acquired title was a bar to the plaintiff's recovery on his covenant for seisin, and a verdict was therefore ordered for the defendant. But it was held by the Supreme Court that however these facts might have been properly admissible in mitigation of damages, still the purchaser had a right to recover at least nominal damages, since the covenant was technically broken at the time of suit brought, and the law was so considered in King *v.* Gilson, *supra*.

course of decision fastens upon the purchaser the subsequently acquired title *nolens volens*, depriving him of the option whether to accept it or to fall back upon his covenants;[1] or, to put it in another form, it has virtually the same effect as an injunction restraining him from proceeding at law upon the covenants.[2]

§ 180. From this it is an easy transition to hold that even although the after-acquired title may not, from peculiar circumstances, absolutely pass from the vendor and inure to the purchaser under the operation of estoppel as thus applied, yet if the vendor can, at any time before recovery and payment of damages upon the covenant, procure the outstanding title and tender it to the purchaser, equity will compel him to receive it and enjoin him from obtaining his damages, and such was actually the decision in a case in Missouri.[3]

[1] In Kincaid *v.* Brittain, 5 Sneed, (Tenn.) 123, it was said: "If the failure of title be only as to part of the land, or if the purchaser has himself extinguished the paramount title, or if his actual possession has been of such a character as to make the title valid under the statute of limitations, or if, for other cause, the breach be merely a technical one, the purchaser will not be entitled to have the damages measured by the consideration money and interest. Such is the proper measure of damages only when there is an entire failure of title, *or where the purchaser has an election to treat it as such.*" But the authorities do not seem to have determined exactly the cases in which the right of election arises, and in the class to be presently considered such a right is entirely taken away.

[2] Thus in Baxter *v.* Bradbury, 20 Me. 262, it was argued for the plaintiff that the title by estoppel could not inure to his benefit without his consent, that he was not compelled to receive the title; but the court held that "by taking a general covenant of warranty he not only assented to, but secured and made available to himself, all the legal consequences resulting from that covenant. Having therefore under his deed, before the commencement of the action, acquired the seisin which it was the object of both covenants to assure, he could be entitled to but nominal damages."

[3] Reese *v.* Smith, 12 Mo. 344. The purchaser, who had received a conveyance with covenants for seisin, of good right to convey, against incumbrances, and of warranty, recovered after the death of his vendor a verdict for damages, measured by the consideration money, against his widow, who was his devisee. The latter bought in the outstanding title, whose existence had caused the breach of the covenant for seisin, and tendered it to the purchaser, who refused to accept it, because his damages would be, owing to the depreciation of the property, greater than the value of the land. [The after-acquired title did not, it should be observed, *actually pass* to the purchaser, because the court held that the widow was not bound by the estoppel, she having been under coverture at the time of joining with the husband in the covenant.] A bill having been filed to enjoin the judgment and compel the purchaser to accept the after-acquired title, the court below decreed accordingly, and this was affirmed on appeal.

"If the court can compel the defendant to receive the title," said Napton, J., delivering the opinion of the court, "it needs no argument to show that the defendant, after receiving the title, should not be permitted to enjoy the estate under an indefeasible title, and at the same time retain the purchase money. Had the title been acquired by Smith in his

§ 181. It has, however, been frequently held in courts of law that the purchaser's right to recover his damages cannot be affected

lifetime, there is no doubt but that title would have passed from Smith to his vendee, Reese, and that, if this had taken place before the trial of the action on the covenant, it would have restricted the plaintiff to nominal damages. It is said that a court of equity cannot compel a covenantee to accept performance in lieu of damages, after the covenantee has elected to take the latter. But a court of equity, in exercising such a power, would only be following the law; and if the covenantor acquires his title after the suit at law has terminated, what could prevent a court of equity from taking notice of what the silent operation of our statute of conveyances would do without the intervention of any court? Would a court of equity, under such circumstances, allow the covenantee to pocket his damages and also retain the land? And can it make any difference, in principle, that the after-acquired title has been through the personal representative, and not through the covenantor himself? It is the act of God alone which has produced this change in the situation of the parties.

"The fact that this property has very much depreciated in value is the strongest circumstance in the case against the exercise of equitable interference. Had the contract been executory, it would perhaps, taken in connection with the lapse of time, be conclusive against the bill. But it must be observed that in this case the question is not whether the vendee shall be compelled to complete a contract and take a conveyance for land, which he agreed to take when land was worth much more than it is now. The contract has been made and conveyance accepted, and possession taken and enjoyed without disturbance. The vendee, having his deed with covenants of general warranty and seisin and for further assurance, could undoubtedly compel the vendor to convey any subsequently acquired title to him. He may sue on the covenant of seisin and recover damages, but, if he prefers, he may still resort to his covenant for further assurance or general warranty. The remedy is then reciprocal. Had the property risen in value, the vendee could unquestionably have forced the title from the vendor, had the vendor acquired any subsequent to his conveyance.

"The case of Cotton *v.* Ward, 3 Mon. (Ky.) 312, is not unlike the present, and is a decisive expression of opinion on the part of the Kentucky Court of Appeals in favor of the exercise of such a power by a court of chancery. Cotton had conveyed the title to Ward, and put him in possession, and, having obtained a judgment against him for a part of the consideration, Ward enjoined it for alleged defects in the title. Pending the injunction, Ward brought his suit at law for a breach of the covenant of seisin, and recovered damages. Cotton filed a cross bill to enjoin this judgment, and, being able to exhibit at the hearing a perfect title, Ward's injunction was dissolved and Cotton's perpetuated, whereby Ward was compelled to take the title, and give up his judgment for damages." From this judgment, however, one of the three members of the court dissented. "The defendant," said he, "having recovered a judgment at law for a breach of the covenant of seisin, the regularity or propriety of those proceedings cannot be revised by a bill in equity. If the damages recovered are greater than the party was entitled to, that alone is no ground for relief. There are no circumstances stated in the bill which, in my opinion, are sufficient to warrant the interference of a court of equity. If relief is granted in this case, then in every case of the recovery of damages for a breach of the covenant of seisin the vendor at his option may procure a title or pay the damages, according as the property has fallen or risen in value."

In the case of Cotton *v.* Ward, moreover, on which the judgment in the above case seems to have been based, it should be observed that the circumstances were peculiar, the purchaser having himself first come into equity, and prayed for the very decree which the court afterwards gave to him. This is carefully stated in

by the fact that it was in his power to purchase or remove the defect of title or incumbrance, nor even that he had, upon offer made, refused so to do.[1]

the decision, in which the Chief Justice said: "Ward had himself first appealed to the Chancellor, asking either that the contract should be rescinded, or that Cotton should be compelled to make further assurance; and, notwithstanding he had, pending his suit in chancery, recovered judgment at law, he still continued the suit until it was finally heard. In the mean time, Cotton had appealed to the same tribunal, and asked that Ward might be compelled to accept the further assurance which Ward, in his bill, had asked that Cotton should be compelled to make. Thus, by the concurrent act of both parties, the court was put in the possession of the cause, and required to exert its jurisdiction; *and whatever room there might be to doubt as to the relief which ought to be granted in a case where Cotton alone was the complainant*, in the actual attitude in which this case is presented there certainly can be no doubt that the court should decree a specific performance by compelling Cotton to make and Ward to accept of further assurance."

[1] Burk *v.* Clements, 16 Ind. 132; Elder *v.* True, 32 Me. 104; Chapel *v.* Bull, 17 Mass. 221; Norton *v.* Babcock, 2 Met. (Mass.) 510; Stewart *v.* Drake, 4 Halst. (N. J.) 143; Miller *v.* Halsley, 2 Green, (N. J.) 48, where the defendant having pleaded that the owner of the paramount title had offered to release it for a moderate sum, which the plaintiff refused, the court held the plea bad; approved in Sanders *v.* Wagner, 32 N. J. Eq. 506; Lloyd *v.* Quimby, 5 Ohio, 265; Butcher *v.* Peterson, 26 W. Va. 447.

The local laws in Massachusetts and some of the other New England States regulating the foreclosure of mortgages provide, however, that even after entry by the mortgagee upon the land for that purpose, it may still be redeemed within three years, by payment of the mortgage debt and costs; and hence although the purchaser may have been actually evicted by the mortgagee, yet if the latter hold the possession only under a conditional judgment, or if it be otherwise defeasible by payment of the amount due on the mortgage with costs, etc., the damages will be limited to that amount; in other words, so long as the purchaser has still a legal right to regain the estate by payment of a certain amount, he can recover no greater damages (and it would seem to be also the law that, although a right of redemption may exist, yet that if the incumbrance binds several properties, a party has no right to redeem less than the whole; Bond *v.* Bond, 2 Pick. (Mass.) 382; Foss *v.* Stickney, 5 Greenl. (Me.) 390; this was one of the points urged in the argument for the plaintiff, in Blanchard *v.* Ellis, 1 Gray, (Mass.) 199, *infra*, p. 259, n. 3); as otherwise he might recover the consideration money, and then obtain the estate by the payment of a smaller sum. Thus where, in Tufts *v.* Adams, 8 Pick. (Mass.) 547, land which was subject to a mortgage was conveyed with covenants against incumbrances and of warranty, the mortgagee had obtained a conditional judgment and been put in possession by a writ of *habere facias*. "But it does not necessarily follow," said the court, "that the damages should be assessed to the value of the land, because the right of redemption is open, and the plaintiff may discharge this incumbrance and restore himself to possession by paying the debt and interest and the costs of suit. . . . The proper rule of damages should be to give the amount due upon the mortgage, with the costs of the suit upon the mortgage against the plaintiff, and thus he will be enabled to redeem the lands from the funds of the defendant." So in the subsequent case of White *v.* Whitney, 3 Met. (Mass.) 89, the court held, "If the right of redemption is not foreclosed, and the land may be redeemed for less than its value, the amount to be paid for such redemption — the amount due on the mortgage — will be the measure of damages, because it will afford the plaintiff a complete indemnity." In the more recent case of Donahoe *v.* Emery, 9 Met. (Mass.)

§ 182. And it has, moreover, been held, upon great soundness of principle, that the purchaser's right to damages is one of which

68 (where the covenant was for quiet enjoyment, but the same principle equally applied, Willson *v.* Willson, 5 Fost. (N. H.) 236), the law was held the same way; and it must be taken to be settled that when the purchaser thinks proper to sue while such a right of redemption is still open on his part, his damages will be limited by the amount of the redemption money.

At the same time it seems to be settled, in accordance with the general principle heretofore stated, that the purchaser is under no obligation to redeem, and if he let the time necessary for that purpose elapse, and the incumbrance thus becomes changed into an absolute title, his right to measure the damages by the consideration money will not be impaired by his not having availed himself of his right to redeem. Elder *v.* True, 32 Me. 104; Sanders *v.* Wagner, 32 N. J. Eq. 506. As the deed in the former case contained also a covenant of warranty, the damages were held to be measured by the value at the time of eviction. This case was a hard one upon the vendor. He sold covenanting against incumbrances; but, finding that an outstanding mortgage still existed, he tendered the amount to the mortgagee, who refused to receive it; and the court held, upon a bill filed to compel him to do so, that the mortgagor, having no longer an interest in the land, had no standing in court to compel acceptance of the mortgage debt (see True *v.* Haley, 24 Me. 297). The mortgage was then foreclosed, and the three years allowed for equity of redemption passed by, when the purchaser sued upon the covenants (Elder *v.* True, *supra*), and the court held him entitled to damages as above stated.

This case is indeed one of the strongest instances of the application of the rule stated in the text; for, in fact, the purchaser, had he chosen so to do, could have thrown all the mortgage debt off from his own shoulders, as there had been a subsequent purchaser from his vendor of another part of the land, bound by the same mortgage, and, according to the rule first established in New York, and afterwards adopted in Maine and many other States, of subjecting property thus sold to the lien of the incumbrance according to the inverse order of its alienation (Clowes *v.* Dickenson, 5 Johns. Ch. (N. Y.) 235; Holden *v.* Pike, 24 Me. 427; and see the cases collected in the note to Aldrich *v.* Cooper, 2 Leading Cases in Equity, 4th Am. ed.), the payment of the whole of the mortgage debt could have been compelled out of the part last sold, which, it was admitted in the case, was more than sufficient for that purpose. The decision, however, though the result was a hard one, seems unobjectionable on principle.

In Norton *v.* Babcock, 2 Met. (Mass.) 510, the defendant, the vendor, having acquired the estate by means of a judgment against its former owner, by virtue of which under local laws the land had been set off to him, leaving however in the former owner an equity of redemption, sold the premises to the plaintiff, "with the usual covenants of seisin and warranty, and against incumbrances." Subsequently, the equity of redemption was levied on and sold under another judgment against the same original owner, and the purchaser of this equity gave notice to the purchaser of the property of his intention to redeem, to prevent which the latter paid him $602.89, being the amount, with interest, for which the equity had been purchased. The value of the estate at that time, as found by the jury, was $1,200; and the value of the improvements made upon it, $500. The purchaser then brought suit upon the covenants.

"It is contended for the plaintiff," said Shaw, C. J., "that the amount thus paid by him to extinguish the incumbrance is the measure of his damages; but we think this cannot be laid down as a rule of damages, without considerable qualification. Where the incumbrance is of such a character that, if not extinguished, it would take the whole estate, and it can be extinguished for less than

a court of equity cannot deprive him, or, in other words, that the option, when there is one, should be the option of the party

the value of the estate, so that the amount paid for its extinguishment would bring a less onerous burden upon the covenantor than he would have to sustain by an eviction, it being for his benefit as well as that of the owner to extinguish it, the amount paid for extinguishing would be the measure of damages, because it would afford the plaintiff a perfect indemnity. Otherwise, the amount thus paid exceeds the amount which the covenantor would have been bound to pay if the plaintiff had been evicted. . . .

"In Wyman *v.* Brigden, 4 Mass. 150, the estate conveyed by the defendant to the plaintiff, with covenants, was rightfully levied upon as the estate of Moses Gill, deceased, for $1,800. Before the year expired, the defendant [it should be plaintiff, as the case shows], never having been put out of actual possession, redeemed by paying the $1,800, it being found that the estate was worth $3,000. It was held that, the plaintiff having derived from the defendant all his estate in the land, including the right to redeem, at a less sum than the actual value of the land, for which he might have been liable on eviction, the difference should inure to the benefit of the covenantor, and that therefore the sum paid for such redemption should be the measure of the plaintiff's damages. We are then to apply this rule to the present case, and the result will be, that if the sum of $602.89, paid by the plaintiff to extinguish the right of redeeming, was less than the defendant would have been liable for had the plaintiff permitted Phelps to redeem, then that is the measure of damages for which the defendant is now liable. If it exceeds that amount, then he is liable only for the smaller amount.

"Had the plaintiff declined the offer to pay, what would have been the amount of damages? As the estate granted by the defendant to the plaintiff actually passed by the conveyance, the defendant being seised, and having good right to convey, subject only to redemption by his creditor, the amount of damages he would have been liable for on his covenants was the value of the land at the time of the eviction. Gore *v.* Brazier, 3 Mass. 543. The value of the land, independent of the improvements, was then $1,200, and the value of the improvements $500; making in round numbers $1,700. By improvements, we here understand buildings or betterments, other than repairs, made by the defendant or the plaintiff after the levy, and before the expiration of the year allowed by law for the redemption. The great difficulty probably arises from the fact of these expensive betterments made upon a defeasible estate. We are of opinion that, if they were made by the creditor after the levy, the debtor could not be charged with them on redemption, for the reasons above stated; and being annexed to the realty, and having become part of the freehold, they would have constituted a part of the actual value at the time of redemption. Suppose them made by the plaintiff, they were made by him after he had acquired a title purporting to be absolute and indefeasible under the defendant's deed of warranty; and we are of opinion, that, as between the plaintiff and defendant, the loss must fall on the latter. It arises from want of caution in giving such a deed, when in fact he had only a defeasible estate. It follows that, if the plaintiff, instead of paying the sum he did to extinguish this right of redemption, had yielded to it and given up the estate, his right on the defendant's covenant would have been to recover to the value at the time of the redemption, enhanced by the value of the betterments which he made upon it, deducting the sum he would have received on redemption. We think there must be a more exact statement of the account and assessment of the damages upon these principles. If the sum paid by the plaintiff for a release of the right of redemption was less than the defendant would have been liable for on redemption, then the sum thus paid by the plaintiff would give him a complete indemnity, and would be the measure of his damages; but if he paid more, in

entitled to the benefit of the covenants, rather than the option of the party bound by them.[1]

Thus in the well-considered case of Tucker *v.* Clarke,[2] a purchaser having brought suit on his covenant refused to accept the outstanding title which his vendors had acquired since the conveyance, and had tendered to him together with the costs of his suit. The vendors having filed a bill to compel him to accept this title, it was dismissed by Sandford, V. C., who said: "The complainants do not ask the court to compel a specific performance of an open agreement. They ask to compel the defendant to give up his claims under a deed executed seven years before the bill was filed. The executed contract was, that the complainants were seised of the lots, and if they were not, that they should repay the consideration money. This is sought to be reconsidered and turned into a contract by which, if it should ever turn out that they were not seised, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there were a semblance of mutuality about it, so that the defendants might have coerced them to procure a good title on discovering the defect. But there is no pretence that the defendant had any such equity. The complainants' ground amounts to this: if the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore to him the consideration paid. If, on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him, and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill without first making such a contract

order to redeem the estate, than the defendant would have been liable to him for upon an actual redemption, then the damage on this breach of covenant cannot exceed the last-mentioned sum."

The difference between this case and that of Tufts *v.* Adams, 8 Pick. (Mass.) 547, *supra*, p. 255, n. 1, is, that in the former the plaintiff had the legal estate temporarily suspended, and in the latter only an option of purchase.

[1] "It is against conscience," says Story, "that a party should have a right of election whether he would perform his covenant, or only pay damages for the breach of it. But on the other hand, there is no reasonable objection to allowing the other party who is injured by the breach to have an election either to take damages at law or to have a specific performance in equity; the remedies being concurrent, but not coextensive, with each other." 2 Story's Eq. Jur. § 717 *a*. And see *infra*, Ch. XI.

[2] 2 Sandf. Ch. (N. Y.) 96.

for the parties; a contract which they never did make, and I presume never would have made if any failure of title had been supposed probable when the conveyance was executed." The soundness of this reasoning seems evident, and it has been recognized in a later case in the same State,[1] and approved and followed elsewhere.[2] In Massachusetts especially, where the doctrine of estoppel has been carried to its fullest extent, it has been lately held that a grantor has no right to fasten upon his purchaser *nolens volens* an after-acquired title,[3] and this de-

[1] Bingham *v.* Weiderwax, 1 Comst. (N. Y.) 513. The facts were these: One Van Buren agreed with a corporation to purchase of it a tract of land for $850 in cash, subject to two mortgages, amounting together to $3,000. On the appointed day the president and certain of the directors executed a deed for the premises, "in consideration of $3,850, and subject to the two mortgages mentioned in the aforesaid articles of agreement," covenanting that they were the true and lawful owners in right of the corporation, and were seised of a perfect estate in fee simple, and had good right to convey. This deed was inoperative to pass the title of the corporation, which was afterwards dissolved. Van Buren went into possession, but not paying the mortgages they were foreclosed in 1843 and sold, when his administrators sued the grantors on their covenant for seisin. The latter filed a bill for a perpetual injunction of this suit, on the ground that at the time of the conveyance all the parties understood that it was sufficient to pass the title, and that the premises had been sold by reason of the mere neglect of Van Buren to pay the mortgages. A demurrer to the bill was overruled by the Vice-Chancellor, but the Court of Appeals reversed this decision, and Jewett, C. J., in delivering the opinion of the court, said: "Van Buren's right of action for the breach of that covenant was perfect the instant the deed was executed. Hamilton *v.* Wilson, 4 Johns. 72; McCarty *v.* Leggett, 3 Hill, 134. It did not arise nor depend in any respect upon the foreclosure of the mortgage and sale under it. Nor did the foreclosure and sale in the least affect the complainant's rights or liabilities. If Van Buren had paid the mortgages, and then he, or his administrator after his death, had brought an action for the breach of the covenant of seisin, it would not have been a good ground in equity for relief against their covenant that he could have compelled the corporation before its dissolution to convey the title to him. He would have the right to rely on his covenant and take his remedy by action upon it."

[2] Burton *v.* Reeds, 20 Ind. 93; Noonan *v.* Ilsley, 21 Wis. 146; s. c. 22 id. 32, where, speaking of Reese *v.* Smith, *supra*, p. 253, n. 3, the court said: "Two of the judges concurred in the opinion, the other dissented, on the ground that a court of equity had no jurisdiction of the action. On principle that decision cannot be sustained, and we know of no authority to sustain it. It is directly in conflict with Tucker *v.* Clarke, 2 Sandf. Ch. 96."

[3] Blanchard *v.* Ellis, 1 Gray, (Mass.) 199. "Supposing it to be well settled," said the court, "that if a new title come to the grantor before the eviction of his grantee it would inure to the grantee, and not deciding, because the case does not require it, whether the grantee, even after eviction, might elect to take such new title and the grantor be estopped to deny it, we place the decision of this case on this precise ground, that where a deed of land has been made with covenants of warranty and the grantee has been totally evicted from the premises by a title paramount, the grantor cannot, after such entire eviction of the grantee, purchase the title paramount and compel the grantee to take the same against his will, either in satisfaction of the covenant against incumbrances, or in mitigation of damages for the breach of it."

The opinion was predicated upon the

cision has been followed and approved in at least two recent cases in Wisconsin,[1] where it is said to be the settled law of

covenant against incumbrances, but the reasoning applies equally to the covenant for seisin. "We do not seek," continued the court, "for a better illustration of the soundness of this principle than is furnished by the facts of this case. The land, for which the consideration stated in the deed was $5,520, was under attachment in a suit in which judgment had been recovered for more than fifty thousand dollars; the entire tract, of which one quarter had been conveyed to the plaintiff, was afterwards levied upon, seisin given to the creditor, and the plaintiff wholly evicted. He had no estate or interest left. The covenant against incumbrances being personal, and not running with the land, he had nothing which could pass by deed. He could not redeem his undivided quarter without a redemption of the entire estate. He could not for a period of ten years enter upon the land without committing a trespass. The defendants admit the existence of the title paramount and the eviction of the plaintiff, but contend, after the eviction has continued ten years, that they as grantors may avail themselves of this rule of estoppel, and force the grantee to take the estate, however changed the situation of his own affairs or the condition of the land. So that the equitable rule of estoppel which forbids the grantor to deny that he had the estate which he had assumed to grant and the truth of his own covenant — a rule established for the protection of the grantee and to be applied only to effect justice and prevent wrong — is converted into a right of election in the grantor, upon a breach of his covenant to pay back the consideration money, or by indirection to reconvey the estate. We say an election by the grantor, for it is clear that the grantee cannot compel the grantor to buy in the paramount title, but must rely solely upon his covenants. It is equally clear that if the estate during the eviction should greatly increase in value, the grantor would not be likely to purchase such paramount title, but would submit to an action on his covenants. So that under any rule of damages suggested, the plaintiff would lose many of the advantages resulting from the ownership of land, including the increase of value by the application of his own labor or capital, or its rise in the market. There is neither mutuality nor equity in such a rule. And we are satisfied, upon examination of the authorities, that no case will be found which carries the doctrine of estoppel to the length claimed by the defendants, which in fact estops the grantee, and leaves a right of election in the grantor. The case of Baxter *v.* Bradbury, 20 Me. 260, has been strongly pressed upon us as a decision of the very question at issue. . . . That was an action for a breach of the covenant of seisin in a deed of warranty, with a mortgage back of the premises of the same date to the grantor. The ground taken by the counsel of the defendant, and upon which the court seem to have proceeded in their judgment, was that there never had been any interruption of the possession of the plaintiff; and seeking to deduce from that case a rule for our guidance, this circumstance must be deemed most material, as for a breach of this covenant against incumbrances nominal damages only could be recovered, unless the plaintiff had been evicted by title paramount, or had actually discharged the incumbrance. The court, in the case of Baxter *v.* Bradbury, refer to a statement of the result of the authorities by the late Chief Justice Parker in the case of Somes *v.* Skinner, 3 Pick. 52. An examination of the whole opinion in that case would lead us to infer that this statement was not made without some misgiving and distrust. The precise question now under consideration was not before the court, and what in that part of the case was decided was, that where a title has inured by estoppel, it will avail the grantee not only against the grantor and his heirs, but against strangers who usurp possession without right; and under the facts of

[1] Nichol *v.* Alexander, 28 Wis. 130; McInnis *v.* Lyman, 62 id. 191.

the State, "supported by weighty authority and sound in principle."

§ 183. In fact, the whole difficulty which this subject presents (if indeed any really exist) grows out of the essential differences between the remedies administered according to the forms of the common law and those which courts of equity provided. The common law knew nothing of rescission of contracts in the sense in which that term is here used; it provided, and sought to provide, only a certain remedy for a certain loss, and was inadequate to work out the incidental problems by which alone, in many cases, substantial and final justice can be dealt out to both plaintiff and defendant.[1]

§ 184. If, however, it be considered that a purchaser still in possession, and having paid nothing for the paramount title, may be allowed to have his damages measured by the consideration

the case and in the view in which it was applied, there is no occasion to reconsider the rule there stated."

It is true that in this case there had been an eviction, and a late writer of authority seems to limit the application of the doctrine to such a case by saying, "If the purchaser be evicted by a better title, it is not in the grantor's power afterwards to acquire a title to the premises, and compel the grantee to accept the same against his will." 3 Washburn on Real Property, 373, 673. But the reasoning would seem equally to apply to any case where the purchaser had a present right to damages, as for example when he had received a covenant for seisin and the title had wholly failed, even though there had been no disturbance of the possession.

[1] Thus in the first report of the Judicature Commission made to Parliament in 1869, it was said: "The common law courts were confined by their system of procedure in most actions (not brought for recovering the possession of land) to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at common law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous." And with reference to the subject matter of the text, it was said in Combs *v.* Tarlton, 2 Dana, (Ky.) 467: "There are too many questions growing out of the rescission of a contract between vendor and vendee put into possession, to allow them to be considered and settled by the jury upon the trial of an action of covenant. The vendor may be entitled to a set-off for the profits of land, for waste and damage; and against these claims the vendee may be entitled to an allowance for improvements. To settle such multifarious and complicated matters, the Chancellor is more competent to administer justice than the common law judge, aided by the hasty inquiry of a jury." Mr. Sedgwick admits the difficulty, but solves it by lessening the value of the covenant to the purchaser. He says: "Any rule by which actual damages are given where no actual loss is sustained, has, in truth, no other effect than to engraft on the courts of law a species of specific performance, irregular and illegitimate; and which neither their forms of procedure, nor the general arrangement of their system, enable them to exercise without great danger of injustice and abuse. The rule should be considered cardinal and absolute, that actual compensation shall only be given for actual loss." 2 Sedgwick on Damages (7th ed.), 12.

money, it is obvious that some provision should be made, so far as the simple machinery of the common law will allow, by which, on payment of the damages by the covenantor, the estate which has been sold should be, such as it is, revested in him. As to this, it has been suggested that the recovery of damages upon the covenant for seisin will of itself operate at law to revest the title in the covenantor.[1] It has, moreover, been decided in two cases in Massachusetts, that a conveyance made by a covenantee who had recovered back his consideration money for a breach of the covenant for seisin, passed no title whatever to the purchaser; decisions which must necessarily have proceeded upon the ground that the title had, by the recovery of the damages, become revested in the covenantor.[2]

[1] Kincaid *v.* Brittain, 5 Sneed, (Tenn.) 123; Recohs *v.* Younglove, 8 Bax. (Tenn.) 335. In the very recent case of Hayes *v.* Ferguson, 15 Tenn. 1, the eviction was partial only, and the option to rescind was denied. Parker *v.* Brown, 15 N. H. 188. "If the grantee," said Parker, C. J., delivering the opinion of the court, "recovers damages for the breach of the covenants of seisin, on the ground that the grantor had no title whatever, the operation of it must be to estop the grantee from setting up the deed afterwards, as a conveyance of the land, against the grantor. We see not why the grantor may not again enter, if he chooses, as against the grantee. A recovery in trespass or trover, with satisfaction, vests the property in the party against whom the damages are assessed. We are not aware of anything in the nature of the feudal investiture, or in the principles which regulate the title to land at the present time, that should require a different rule in relation to real estate. The record of the recovery will furnish as good an estoppel as that which arises from a disclaimer. Hamilton *v.* Elliot, 4 N. H. 182. The defendants may re-enter if they think proper, and will hold, under their former possessions, against all persons who cannot show a better right." So in the later case of Johnson *v.* Simpson, 36 N. H. 96, where judgment had already passed against the defendant and the only question was of damages, the court seemed to be of opinion that had not the defendant been defaulted he would not have been subjected to any damages (on the ground that the deed had conveyed a sufficient title to the plaintiff), and then said, "It may be a question whether the plaintiff, by taking judgment for damages, may not endanger his title to the premises."

[2] Porter *v.* Hill, 9 Mass. 36; Stinson *v.* Sumner, id. 150. "It would certainly be manifestly against the principles of justice," said the court in the latter case, "that a grantee should recover either his purchase money or the value of the land against the grantor upon an alleged breach of covenant that nothing passed by the deed, and that he should yet be considered the owner of the land, under the very deed which he had alleged to be inoperative. It has lately been decided (Porter *v.* Hill) that one who has recovered judgment for damages for a breach of the covenants in his deed, upon an allegation that the grantor was not seised and had no right to sell, shall not set up his deed against the grantor, or any one claiming under him, in an action for the land; but that a judgment for the recovery of damages for the breach of such covenants shall avail against such deed, when pleaded by a party having a right to plead such judgment. This case depends on the same principle." Such a result seems, too, to have been the opinion of Kent, C. J., in Morris *v.* Phelps, 5 Johns. (N. Y.) 55, and has been cited *arguendo* in Fitch *v.*

§ 185. If, however, it be considered as at all doubtful whether by the recovery of the consideration money the estate would, by mere operation of law, revert to him from whom the damages had been recovered, the court might, in the exercise of its discretion, stay the execution,[1] or reserve the actual entry of judgment until a reconveyance were made to him. It would, perhaps, be a matter of prudence for the purchaser to offer such a reconveyance before or at the time of the trial,[2] although it would be no bar to his action that he had not done so.[3]

Baldwin, 17 Johns. (N. Y.) 164; and in the somewhat recent case of Blanchard *v.* Ellis, 1 Gray, (Mass.) 202, the court said, "The question arises, How will the defendants, the grantors, be protected? Will they not still be estopped to deny the title of the plaintiff, if he should bring his suit of entry for the land? The answer is, that the judgment in this suit will be a perfect bar to the plaintiff and those claiming under him. Porter *v.* Hill, 9 Mass. 34." It would seem, however, that a mere recovery should not by itself be allowed to have such an effect, unaccompanied by any evidence of payment. Foss *v.* Stickney, 5 Greenl. (Me.) 392.

[1] In cases where the deed has, in addition to the covenant for seisin on which suit has been brought, also contained covenants for quiet enjoyment or of warranty as to which there had as yet been no breach, courts have ordered stay of execution upon the judgment on the former covenant, until the plaintiff should have executed to the defendant a quitclaim deed of the premises or a release of the latter covenants. Catlin *v.* Hurlburt, 3 Verm. 409; Blake *v.* Burnham, 3 Wms. (Verm.) 437; Benjamin *v.* Hobbs, 31 Ark. 151.

The Revised Code of Georgia provides: "An offer to rescind is not necessary to a recovery upon a covenant of warranty. An offer by the warrantor to rescind, and a refusal by the warrantee, should be considered in estimating damages." Rev. Code, 1882, § 2704.

[2] Alexander *v.* Schreibner, 13 Mo. 275. "The covenant being broken and failing to obtain the title he purchased, he had only to tender a deed reconveying all the interest he had acquired from the county, and then recover what he had paid for the purchase of the lots." Frazer *v.* Supervisors, 74 Ill. 282. Sugd. on Vend. (14th ed.) 611. In the rival treatise on Vendors and Purchasers, however, the author says: "Lord St. Leonards seems to consider that where the title is defective within the covenant, the purchaser before eviction may offer to reconvey the estate and claim the entire purchase money; but no authority is cited for this proposition, which appears to be untenable, the extent of the damnification being the difference between that which the covenantee has and that which he ought to have." Dart on Vend. (5th ed.) 792. In the first edition, however, the criticism was thus expressed: "But no authority is cited for this proposition; at any rate, if an action were brought before eviction unaccompanied by an offer to reconvey, it seems that the entire value could not be recovered." Dart on Vend. (1st ed.) 374.

[3] Bender *v.* Fromberger, 4 Dall. (Pa.) 437, note; Ives *v.* Niles, 5 Watts, (Pa.) 329; Lot *v.* Thomas, Penn. (N. J.) 299; Shorthill *v.* Ferguson, 47 Io. 284 (s. c. 44 id. 249); Lawless *v.* Collier, 19 Mo. 485. Bottorf *v.* Smith, 7 Ind. 673, is not at variance with this position. It was an *action for the purchase money* of land conveyed with a covenant for seisin, and the defendant in his answer (under the code) averred that the grantor was not seised of any good title in fee simple, and that the conveyance was of no value. The plaintiff objected that the grantor might have been seised of a lesser estate and that there was no offer to reconvey, which objections the court held to be well taken; "because, if the plaintiff receives no purchase money, he would be entitled to a reconveyance of whatever estate he might

But whatever may be these difficulties in a court of law, there can be little doubt, on general principles, that equity would restrain a covenantee who had recovered back the consideration money from setting up, as against his covenantor, that title which by his action on the covenant he had asserted to be defective,[1] and would probably decree a reconveyance by him.[2]

§ 186. Whatever may be the technical or the practical rule as to the measure of damages upon a *total* breach of the covenant for seisin, it is well settled that upon a partial breach a purchaser may, and it seems must, recover *pro tanto*. Thus where in the early case of Gray *v.* Briscoe,[3] one covenanted that he was

have conveyed." Apart from this, it is well settled that in an action for the purchase money, mere absence of title is no defence to its payment. See *infra*, Ch. XIV.

In the first edition of this treatise it was said: "If nothing had been paid and no pecuniary loss had been suffered, and the possession had not been disturbed and the purchaser did not offer to reconvey, it is believed that nominal damages only would in general be allowed. The technical rule, therefore, that the covenant for seisin is broken, if at all, at once and completely, is as respects the damages little more than a technical one." Covenants for Title (1st ed.), p. 83 (citing the case of Collier *v.* Gamble, 10 Mo. 472, where it had been held that "the reasonable rule was to recover nominal damages only, until the estate conveyed was defeated, or the right to defeat it had been extinguished"), and this passage was cited in the more recent case of Overhiser *v.* McCollister, 10 Ind. 44, and held to be "obviously just." The treatise then went on to say, "Cases may of course occur, in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet where the failure of title is so complete, and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money." Upon subsequent consideration, the opinion was formed that the first passage above quoted did not correctly express the law and it was omitted in the second edition. Since then, the case in Missouri came up again (Lawless *v.* Collier, 19 Mo. 480), where the second of the passages above quoted was referred to, and the case decided accordingly. It is believed that the text as now offered contains the true statement of the law, and that if the breach of the covenant has occurred, affecting the whole of the title (for where it touches part only, Morris *v.* Phelps, 5 Johns. (N. Y.) 56, is a distinct authority that the purchaser has no option to rescind, and in the recent case of Hayes *v.* Fergusson, 15 Tenn. 1, the law was held the same way), the plaintiff has a right to recover damages measured by the consideration money, the effect of whose receipt will be, subject to the exceptions hereafter to be noticed, to revest the title, such as it is, in the covenantor. In the fourth edition of this treatise it was suggested that in Overhiser *v.* McCollister, 10 Ind. 44, the Supreme Court of Indiana seemed to have adopted the English doctrine that the covenant for seisin is not broken as soon as made, but that the breach is "a continuing one" until actual damage suffered. The court has since repudiated the doctrine; Bethell *v.* Bethell, 54 Ind. 428; Craig *v.* Donovan, 63 id. 513; McClure *v.* McClure, 65 id. 482. See *infra*, Ch. X.

[1] Bank *v.* Mersereau, 3 Barb. Ch. (N.Y.) 571.

[2] McKinny *v.* Watts, 3 A. K. Marsh. (Ky.) 268; Park *v.* Cheek, 4 Cold. (Tenn.) 28.

[3] Noy, 142. In the report of this case it has been erroneously printed, "Held, the covenant was *not* broken;" but the

seised of Blackacre in fee simple, when in fact it was copyhold land, the jury were directed to give damages according to the rate at which the county valued fee simple more than copyhold land.[1] So where in a case in New York,[2] the grantors had a life estate in four sixths of the premises and a fee in the remainder, it was held in an action on the covenant for seisin that the damages should be measured by deducting the value of the life estate from four sixths of the purchase money, and without interest, as there was no one to call upon the plaintiff for the mesne profits. So where a tenant for life having conveyed with covenant for seisin in fee, the purchaser was held entitled to recover the consideration money, deducting therefrom the value of the life estate,[3] and, for the same reason as in the case last cited, without interest. The principle adopted in these cases has been recognized and applied in many others.[4]

§ 187. It naturally follows that upon a failure of title in a specific part of the subject of the sale, either party may, for the purpose of affecting the damages, produce evidence to show the relative value which that part bears to the whole, and this, as

context sufficiently shows this to be a mistake. "This case well illustrates that want of any precise measure of damages which characterizes almost all the early English decisions." Sedgwick on Damages (7th ed.), 314.

[1] In Wace *v.* Bickerton, 3 De G. & S. 751, one seised of a fee simple estate worth £57 per annum, and of an estate for life worth £190 per annum, conveyed them on the marriage of his son to trustees, and covenanted that they were together worth £200 a year and that he was seised thereof in fee simple free from all incumbrances. Upon the death of the settlor, his grandchild, the only issue of the marriage, filed a bill against the executors of his grandfather, praying a declaration that the estate of the latter was indebted to the trustees of the settlement in such a sum as would be sufficient to make up from its income the difference between the value of the fee simple estate, viz. £57, and the annual sum of £200. But Vice-Chancellor Bruce held that he was entitled not only to the sum prayed for, but to such a sum as would produce the annual value of the estate held for life, viz. £190 per annum.

[2] Guthrie *v.* Pugsley, 12 Johns. (N. Y.) 126.

[3] Tanner *v.* Livingston, 12 Wend. (N. Y.) 83; Lockwood *v.* Sturdevant, 6 Conn. 373.

[4] Tierney *v.* Whiting, 2 Col. 620; Hubbard *v.* Norton, 10 Conn. 435; Phillips *v.* Reichert, 17 Ind. 120; Hoot *v.* Spade, 20 id. 326; Wright *v.* Nipple, 92 id. 310; McNear *v.* McComber, 18 Io. 14; Dale *v.* Shively, 8 Kans. 276; Blanchard *v.* Hoxie, 34 Me. 376; Morrison *v.* McArthur, 43 id. 567; Bryan *v.* Smallwood, 4 Har. & McH. (Md.) 483; Lucas *v.* Wilcox, 135 Mass. 77; Ela *v.* Card, 2 N. H. 175; Rickert *v.* Snyder, 9 Wend. (N. Y.) 416; Furniss *v.* Ferguson, 15 N. Y. 443; Adams *v.* Conover, 22 Hun, (N. Y.) 424; Nyce *v.* Obertz, 17 Ohio, 76; Recohs *v.* Younglove, 8 Bax. (Tenn.) 385; Mills *v.* Catlin, 22 Verm. 98 (in which case it was held not to have been error to admit life assurance tables to show the value of the life estate); Messer *v.* Oestreich, 52 Wis. 684. In Terry *v.* Drabenstadt, 68 Pa. 400,

was said in the leading case of Morris *v.* Phelps,[1] operates with equal justice as to all the parties to a conveyance. "Suppose," said the court, "a valuable stream of water, with expensive improvements upon it, with ten acres of adjoining barren land, was sold for ten thousand dollars, and it should afterwards appear that the title to the stream with the improvements on it failed, but remained good as to the residue of the land, would it not be unjust that the grantee should be limited in damages, under his covenants, to an apportionment according to the number of acres lost, when the sole inducement to the purchase was defeated, and the whole value of the purchase had failed? So, on the other hand, if only the title to the nine barren acres failed, the vendor would feel the weight of extreme injustice, if he was obliged to refund nine tenths of the consideration money. This is not the rule of assessment. The law will apportion the damages to the measure of value between the land lost and the land preserved. This doctrine is laid down as an elementary rule in Pothier's treatise on the Contract of Sale.[2] He says that an eviction of part of the thing sold not only gives an action on the warranty, but the purchaser will recover a proportion of the price paid, in a ratio to the amount of the part from which he was evicted; and that if the eviction be of an integral part of the estate sold, as, for instance, of a meadow or vineyard belonging to the farm, the damages must be assessed according to a valuation of the price of the meadow or vineyard, and the proportion which it bears to the price of the whole estate. Nothing can be clearer than the

the covenantee was evicted in an action of dower of one third of the land. The court below instructed the jury, "In measuring the damages you must take into consideration the age and health of the widow; and it has been held that the rule of damages would be the amount of the depreciation of the fee simple interest according to the consideration money paid to the covenantor;" and the Supreme Court said, "The rule laid down clearly appears to have been that the jury should find for the plaintiff the value of the life interest of the widow, estimating the fee simple by the purchase money. This is certainly in accordance with the authorities." In McAlpin *v.* Woodruff, 11 Ohio, 125, the covenantee was a lessee for ninety-nine years at a fixed rent, that being the whole consideration, and upon a recovery by the lessor's widow of her right of dower it was held that the covenantee was not entitled to recover the present value of the dower interest, to be measured by the life tables, but to an abatement of one third of the rent during the widow's life, and the lessee was enjoined during that time from collecting more than two thirds of the rent. Some of the cases here cited were actions upon other covenants than that for seisin; but as to this there is no difference in principle between them.

[1] 5 Johns. (N. Y.) 56.

[2] *Traité du Contrat de Vente*, No. 139, 142, 199.

equity of this rule."[1] It has accordingly been frequently recognized and applied,[2] and in a recent case in the Exchequer the loss of the use of part of the premises for the purpose for which they had been leased was considered to be a proper element for the jury on the question of damages.[3]

[1] "The same principle," continued the learned judge, "is to be met with in the civil law. *Bonitatis estimationem faciendam, cum pars evincitur.* And Ulpian puts and answers this question: *Quid enim, si, quod fuit in agro pretiosissimum, hoc evictum est; aut quod fuit in agro vilissimum? Æstimabitur loci qualitas, et sic erit regressus.* Dig. 21, § 2, l. 1, l. 13, and l. 64, § 3. The recovery in value upon the warranty at common law was regulated by the same rule. The *capias ad valentiam* was issued to take as much land of the warrantor as was equal to the value of the land lost. *Cape de terra in balliva tua ad valentiam tantæ terræ quod B. clamat ut jus suum;* and if the lands of the warrantor lay in another county, different from that in which the lands in controversy lay, then the lands in question were first appraised by a sheriff's inquest, and afterwards the writ went to the sheriff of the other county, to take lands of equal value, which value was specified in the writ. Bracton, 384 *a*, *b*. If the recovery in the present case had been of an undivided part of all the lands conveyed by the deed, then the rule of apportionment of damages according to the relative value could not have been applied, and this distinction runs through the authorities on the subject. But the plaintiff's title failed only to an undivided part of a specified tract, and remained good to another and larger tract conveyed by the same deed and included in the same consideration. The apportionment according to the relative value is therefore strictly and justly applicable."

[2] Major *v.* Dunnavant, 25 Ill. 265; Wadhams *v.* Innes, 4 Brad. (Ill.) 642; Mischke *v.* Baughn, 52 Io. 528; Blanchard *v.* Hoxie, 34 Me. 376; Blanchard *v.* Blanchard, 48 id. 177; Leland *v.* Stone, 10 Mass. 463; Cornell *v.* Jackson, 3 Cush. (Mass.) 510; Giles *v.* Dugro, 1 Duer, (N. Y.) 331; Dickens *v.* Sheppard, 3 Murph. (N. C.) 526; Wallace *v.* Talbot, 1 McC. (S. C.) 467; Raines *v.* Calloway, 27 Tex. 685; Beverly *v.* Lawson, 3 Munf. (Va.) 317; Butcher *v.* Peterson, 26 W. Va. 447; Griffin *v.* Reynolds, 17 How. (S. C. U. S.) 611. In Pennsylvania this doctrine was, in King *v.* Pyle, 8 Serg. & Rawle, 166, limited to a case where fraud had been practised, Tilghman, C. J., saying, "I give no opinion whether, in case of a *fair sale* and in an eviction of a small part, the measure of damages should be the average price agreed to be paid for the whole tract; I will only say that I do not consider that point as settled." But in the subsequent case of Lee *v.* Dean, 3 Whart. (Pa.) 331, the court said: "It has also been contended, supposing that the plaintiff is entitled to recover for the non-conveyance of the one acre one hundred and forty-four perches, that he ought only to recover back such proportion of the whole purchase money paid by him as the one acre one hundred and forty-four perches bears to the whole quantity of land paid for. This, however, even in a case untainted with fraud, has neither reason nor authority to support it, as is very clearly shown by Chief Justice Kent, in Morris *v.* Phelps, 5 Johns. 56." And in the more recent case of Beaupland *v.* McKeen, 28 Pa. 134, this was considered to be settled law. See Nelson *v.* Matthews, 2 Hen. & Munf. (Va.) 164.

[3] Rolph *v.* Crouch, L. R. 3 Exch. 44. The plaintiff, who was a florist, had leased a house and an adjoining lot and built a conservatory upon the latter. There was a paramount title to the back ends of both lots, under which he was evicted. Besides a reduction of the rent, the jury found the value of the conservatory and compensation for loss of the land, and this was sustained by the court. "The plaintiff, relying on the performance by the defendant of his covenant [for quiet enjoyment], erected the conservatory for the better and

But in this case of Morris *v.* Phelps, another question of much practical importance arose. It was urged for the plaintiff, that if he were restricted from recovering *more* than the consideration money, he ought not to recover *less;* that he had a right to full damages for the whole land, and ought not to be compelled to accept a good title as to part, where there was no title to the other part,[1] for the very part which was lost might have been the principal inducement to the purchase; in other words that the purchaser had a right, under such circumstances, to use the machinery of an action on the covenant for seisin as a means of rescinding the sale.[2] But the court held that in the first place the plaintiff had never offered to rescind the sale, nor, if he had, did it conceive that it would have availed him in a court of law, since the contract was executed and part of the consideration fulfilled; and, apart from this, there was, it was said, nothing in the case to authorize the plaintiff to go for the whole consideration because the title to part failed. That fact alone did not rescind the sale after the deed was delivered and the consideration paid, and the plaintiff was held to be entitled to recover damages only in proportion to the extent of the defect of title.[3]

more conveniently carrying on of his trade as a florist. He has lost the use of it, and I think he is entitled to the sum given him by the jury for that loss." Per Kelly, C. B. It will, however, be remembered that as between landlord and tenant the measure of damages is not, according to some of the decisions, the same as between vendor and purchaser, for the reason that as between the latter all relations, as a general rule (except of course as to payment of the unpaid purchase money), cease with the execution of the deed. *Aliter* in many cases, in leases, and even in sales where the unpaid purchase money is to be secured by buildings to be erected by the purchaser. See *supra*, § 169 *et seq.*

[1] Citing Farrer *v.* Nightengal, 2 Esp. 639, where the defendant had sold a leasehold interest for eight and a half years and it turned out that this interest in the premises was for six years only. Lord Kenyon said that the purchaser had a right to consider the contract at an end and bring his action to recover back any sum he might have paid in part performance. This, however, it must be noticed, was the case of an *executory* contract, and no lines are more sharply drawn than those which distinguish the rights of vendor and purchaser in an executory, as distinguished from an executed contract for the sale of land.

[2] See *infra*, Ch. XIV.

[3] "This is an old and well-settled rule of damages," said the court; "thus in the case of Beauchamp *v.* Damory, Year Book 29 Edw. III. 4, it was held by Hill, J., that if one be bound to warranty, he warrants the entirety, but he shall not render in value but for that which was lost. In 13 Edw. IV. 3 (and which case is cited in Bustard's case, 4 Rep. 121 *b*), the same principle was admitted, and it was declared and agreed to by the court, that in exchange, where a want of title existed as to part, the party evicted might enter as for a condition broken, if he chose; but if he sued to recover in value, he should recover only according to the value of the part lost. Though the condition be entire and extends to all, yet it was said that the warranty upon the exchange might severally extend to part. So in the case of Gray *v.*

The same ground was taken in a late case in Indiana, where it was claimed that as the lot had been purchased for a particular purpose, and as the failure of title rendered the premises useless for that purpose, the case should be taken out of the general rule which measured the damages only by the relative value of the part lost, but the case was decided in accordance with the rule in Morris *v.* Phelps.[1] And whatever may be the apparent or real hardship of the rule so laid down, there appears to be no escape from it in any purely common law form of proceeding.[2]

§ 188. If any doubt exist as to the right of the holder of a covenant for seisin or of right to convey to recover the consideration money or a part of it when he has neither lost the land nor incurred expense in purchasing the paramount title, there is none with respect to the covenant against incumbrances, which, while being considered equally with them to be broken as soon as made, is yet, as respects the measure of damages, treated purely as a covenant of indemnity, and it is well settled that if the incumbrance has inflicted no actual injury upon the plaintiff, and he has paid nothing towards removing or extinguishing it, he can obtain but nominal damages, as it is considered that

Briscoe, Noy, 142, B. covenanted that he was seised of Blackacre in fee, whereas in truth it was copyhold land in fee, according to the custom ; and the court said that the jury should give damages according to the difference in value between fee simple land and copyhold land. There is then no law or reason why the plaintiff should recover more than one sixth of the consideration money and interest for the two tracts mentioned in the first count, and five sixths of the consideration money and interest for the tract mentioned in the second count."

[1] Phillips *v.* Reichert, 17 Ind. 122. "The counsel for the appellee admits," said the court, "that there are no authorities directly sustaining the position thus assumed. We have looked, within a limited range, for authorities upon this point, but find none. The absence of authority sustaining the position is some evidence, at least, that such is not the law. An analogy is sought to be drawn from the rule that where goods are ordered from a manufacturer for a particular purpose, there is an implied warranty that they shall be fit for the purpose designed. Such warranty may well be implied, and yet furnish no analogy for settling the rule of damages on a breach of the express warranty of title contained in the covenants of a deed." And somewhat, but not fully, to the same effect are the cases of Batchelder *v.* Sturgis, 3 Cush. (Mass.) 301, and Wetherbee *v.* Bennett, 2 Allen, (Mass.) 430, *infra*, p. 273, note. It should be noticed also of Phillips *v.* Reichert, that, like many others heretofore referred to, it was not an action on the covenant, but its breach was set up as a defence to payment of the purchase money, as it was also in the very recent case of Butcher *v.* Peterson, 26 W. Va. 447.

[2] Thus, in Rolph *v.* Crouch, L. R. 3 Exch. 44, referred to *supra*, p. 267, n. 3, (which, it must be borne in mind, was a case between landlord and tenant,) while the jury were suffered to let the loss of the purpose for which the property had been leased enter into the measure of damages, there was no pretence of rescinding the contract upon that ground in a court of law.

he shall not be allowed to recover a certain compensation for running the risk of an uncertain injury.[1] Thus in Delavergne *v.* Norris,[2] the plaintiff proved the existence of several mortgages on the premises conveyed, on which he had paid part of the amount thereby secured, leaving a balance still due thereon,[3] and the court held that judgment should be entered only for the amount which he had actually paid. "If the plaintiff when he sues on a covenant against incumbrances has extinguished the incumbrance, he is entitled to recover the price he has paid for it. But if he has not extinguished it, but it is still an outstanding incumbrance, his damages are but nominal, for he ought not to recover the value of an incumbrance on a contingency where he may never be disturbed by it. This is the reasonable rule; for if he was to recover the value of an outstanding mortgage, the mortgagee might still resort to the defendant on his personal obligation and compel him to pay it;[4] and if the purchaser feels the inconvenience of existing incumbrances, and the hazard of waiting until he is evicted, he may go and satisfy the mortgage and then resort to his covenant."[5] This case has been frequently cited and approved, and the rule that nominal damages only are to be recovered for a merely technical breach of the covenant against incumbrances is supported by the entire weight of authority.[6]

[1] Vane *v.* Lord Barnard, Gilb. Eq. 7, per Lord Cowper; see this case *supra*, p. 87, n. 1; Eaton *v.* Lyman, 30 Wis. 41.

[2] 7 Johns. (N. Y.) 358.

[3] It also appeared that the defendant was insolvent and unable to pay any part of the mortgages.

[4] The suggestion that the holder of the incumbrance might resort to other remedies against the covenantor, and thus subject him to a double loss, arising from the same cause, was also made in Davis *v.* Lyman, 6 Conn. 255, and Brooks *v.* Moody, 20 Pick. (Mass.) 474. In Stanard *v.* Eldridge, 16 Johns. (N. Y.) 254, it was said, "It is supposed that this principle is not applicable here, for it is stated in the case that no bond was given; still the mortgagor might be sued on the covenant to pay the money which is imported in every mortgage. We ought not to refine on this salutary principle that before there can be a recovery on a covenant against incumbrances the covenantee must pay and satisfy them."

[5] So, in the case of a municipal assessment; Coburn *v.* Litchfield, 132 Mass. 449. So in Braman *v.* Bingham, 26 N. Y. 494, the premises were conveyed with a covenant that they were free from all incumbrance except three mortgages amounting in the aggregate to $12,400. The plaintiff proved that the mortgages amounted to $12,800, and that he had paid $3,000. "The existence," said the court, "of $400 of incumbrances in excess of the amount named in the covenant constituted a breach of the covenant, and entitled the plaintiff to nominal damages, without having made any payment. Such covenant is broken as soon as made, if ever. When the plaintiff paid the excess of $400, he became entitled to recover that amount as damages for the breach."

[6] Davis *v.* Lyman, 6 Conn. 255; Briggs *v.* Morse, 42 id. 258; Brady *v.* Spurck,

§ 189. But as nothing is better settled than that upon a covenant of indemnity, strictly so called, if the covenantee sue *before* loss has been sustained, the verdict must be for the defendant, and also that such verdict will be no bar to a subsequent recovery *after* loss has been sustained, it may be reasonably asked why if the covenant against incumbrances be *as to the measure of damages* treated as a covenant of indemnity should there be a recovery of even nominal damages if no loss has been sustained, and will such recovery be a bar to a future action?

The answer to this is purely technical; in nearly all of the United States the covenant is regarded as a covenant *in præsenti* and broken as soon as made, being "single, entire, and perfect in the first instance," [1] and of course the right of action and the right to damages instantly accrues, and although, as has been seen, the plaintiff has been allowed to extinguish the incum-

27 Ill. 478; Willets *v.* Burgess, 34 id. 500; Whisler *v.* Hicks, 5 Blackf. (Ind.) 102; Smith *v.* Ackerman, id. 541; Pomeroy *v.* Burnett, 8 id. 143; Black *v.* Coan, 48 Ind. 385; Bundy *v.* Ridenour, 63 id. 406; Bean *v.* Mayo, 5 Greenl. (Me.) 94; Randell *v.* Mallett, 14 Me. 51; Herrick *v.* Moore, 19 id. 313; Clark *v.* Perry, 30 id. 151; Read *v.* Pierce, 36 id. 455; Prescott *v.* Trueman, 4 Mass. 627; Wyman *v.* Ballard, 12 id. 304; Jenkins *v.* Hopkins, 8 Pick. (Mass.) 348; Leffingwell *v.* Elliott, id. 457 (s. c. 10 id. 204); Tufts *v.* Adams, id. 549; Brooks *v.* Moody, 20 id. 476; Comings *v.* Little, 24 id. 269; Harrington *v.* Murphy, 109 Mass. 299; Wilcox *v.* Musche, 39 Mich. 101; Norton *v.* Colgrove, 41 id. 544; Kellogg *v.* Malin, 62 Mo. 429; Willson *v.* Willson, 5 Fost. (N. H.) 235; Smith *v.* Jefts, 44 N. H. 482; Stewart *v.* Drake, 4 Halst. (N. J.) 141; Pitcher *v.* Livingston, 4 Johns. (N. Y.) 10; Delavergne *v.* Norris, 7 id. 358; Hall *v.* Dean, 13 id. 105; Stanard *v.* Eldridge, 16 id. 254; Baldwin *v.* Munn, 2 Wend. (N. Y.) 405; Reading *v.* Gray, 37 N. Y. Supr. Ct. 79; Andrews *v.* Appel, 22 Hun, (N. Y.) 429; Foote *v.* Burnett, 10 Ohio, 317; Patterson *v.* Stewart, 6 Watts & Serg. (Pa.) 528; Meyers *v.* Brodbeck, 17 Weekly Notes Cases, (Phil., Pa.) 120; s. c. 1 Central Rep. 407; 2 Eastern Rep. 630 (and note); Richardson *v.* Dorr, 5 Verm. 20; Smith *v.* Perry, 26 id. 279; Cole *v.* Kimball, 52 id. 639; Rosenberger *v.* Keller, 33 Grat. (Va.) 489; Pillsbury *v.* Mitchell, 5 Wis. 21; Eaton *v.* Lyman, 30 id. 41. In Reasoner *v.* Edmundson, 5 Ind. 393, where a paramount mortgage had been foreclosed, this course of decision was carried so far as to hold that although "the mortgage did constitute a breach of the covenant that the property was unincumbered, yet for this breach only nominal damages were recoverable till after the purchaser has been evicted." See, as to covenants of indemnity generally, Chace *v.* Hinman, 8 Wend. (N. Y.) 452; Rockafeller *v.* Donelly, 8 Cow. (N. Y.) 618, questioned in Aberdeen *v.* Blackmar, 6 Hill, (N. Y.) 324; Gilbert *v.* Wiman, 1 Comst. (N. Y.) 563; Jeffers *v.* Johnson, 1 Zabr. (N. J.) 73. In the first of these cases the covenant was for indemnity against *liability*, which distinguishes it therefore from the others. (In the recent case of Conner *v.* Beam, 43 N. H. 202, this distinction was elaborately noticed.) The student will of course observe the difference between a covenant of indemnity against incumbrances and a covenant to discharge of incumbrances. See *supra*, § 74.

[1] 4 Kent's Com. 472, and see fully as to this subject, *infra*, Ch. X.

brance after suit brought and to measure his damages by the amount so paid, yet where such is not the case and the incumbrance has inflicted no actual injury, though the right of action may be perfect, the right to damages is but nominal.[1]

And as has been already said, inasmuch as a recovery of even nominal damages can be pleaded in bar of any action which might be subsequently brought, since there can be but one recovery for one breach,[2] the practical uselessness in many cases of the covenant as a covenant of indemnity is sufficiently apparent.[3]

§ 190. Where the incumbrance cannot be extinguished or removed by purchase, it has been often said, in a general way, that the damages are to be estimated by the jury according to the injury arising from the existence of the incumbrance.[4]

[1] Thus as was said in Smith *v.* Jefts, 44 N. H. 482, "this covenant, being *in præsenti*, was broken as soon as it was made, and a right of action at once arose to the plaintiff to recover such damages as he sustained. If he extinguished the incumbrance by the payment of a reasonable sum, he might add that to his damages, even though paid after the commencement of his suit; but if not extinguished at the time of the assessment of the damages, he could not so add the amount, but would be entitled to nominal damages only. Osgood *v.* Osgood, 39 N. H. 209; Willson *v.* Willson, 5 Fost. (N. H.) 235; Brooks *v.* Moody, 20 Pick. (Mass.) 474; Thayer *v.* Clemence, 22 id. 493; Clark *v.* Swift, 3 Met. 390; 4 Kent Com. 471, 472; 2 Washb. R. P. *649. The right of action, then, was perfect in the plaintiff immediately on the delivery of the deed, and the subsequent extinguishment of the incumbrance by either party could only affect the damages and not the right of action."

[2] *Supra*, § 178.

[3] A good illustration is found in Read *v.* Pierce, 36 Me. 460, where the defendant had conveyed to the plaintiff certain premises with covenants for seisin, of right to convey, against incumbrances, and of warranty, and, some years after, the plaintiff had been evicted under a paramount mortgage. The defendant pleaded his discharge in bankruptcy between the date of the deed and the eviction, which the court held to be no defence as against the covenant of warranty of which there was no breach until eviction, and therefore no existing claim provable before the commissioner of bankruptcy (as to which see *infra*, Ch. XIII.); but that as to the covenant against incumbrances the discharge was a bar, as although the covenantee had not paid off the mortgage, yet he might have proved his claim before the commissioner, although only nominal damages would then have been allowed him.

So in Taylor *v.* Heitz, 87 Mo. 660, the breach was an outstanding lease for which, before the end of the term, the grantee recovered damages assessed at the rents and profits to verdict, and it was held that as the cause of action was entire and indivisible, the judgment exhausted the remedy.

[4] Prescott *v.* Trueman, 4 Mass. 630; Harlow *v.* Thomas, 15 Pick. 69; Batchelder *v.* Sturgis, 3 Cush. (Mass.) 205; Hubbard *v.* Norton, 10 Conn. 422; Willson *v.* Willson, 5 Fost. (N. H.) 229; Porter *v.* Bradley, 7 R. I. 542; Giles *v.* Dugro, 1 Duer, (N. Y.) 335; Mohr *v.* Parmelee, 43 N. Y. Sup. Ct. 320. See Dexter *v.* Manley, 4 Cush. (Mass.) 14, *supra*, p. 239, n. 1; Mills *v.* Catlin, 22 Verm. 106. And where the incumbrance is such that its existence is rather a benefit than an injury to the land, obviously nominal damages only can be recovered. Wadhams *v.* Swan, 109 Ill. 46. In that case the incumbrance was a railway across a farm.

§ 191. If the incumbrance be an easement or servitude, the damages may, upon well-settled principles, be based upon the natural and proximate consequences to the plaintiff of the existence and continuance of the incumbrance.[1] Thus where the incumbrance was a right of way over the land which subsisted at the time of the conveyance and for some time after, the court said, in a case in Massachusetts: "The defendant contended that the evidence showed that the plaintiff had never been disturbed in the enjoyment of his estate by any user of the way, and that the rights of way had been extinguished without expense, and asked that the jury should be instructed to return a verdict for nominal damages only, but the judge declined to give these instructions. It does not follow from these facts that no actual damages had been sustained. While the right of way lasted, the plaintiff was precluded from using the part of the land covered by the way as fully as he might otherwise have done. He could not set a tree, or a post, or a building upon it, or enclose or cultivate it, or sell or lease it to any person to whom such an incumbrance would be objectionable. It was an apparently permanent subtraction from

[1] Greene *v.* Creighton, 7 R. I. 10; Harlow *v.* Thomas, 15 Pick. (Mass.) 66; Mitchell *v.* Stanley, 44 Conn. 312; McDunn *v.* Des Moines, 39 Io. 286; Koestenbader *v.* Peirce, 41 id. 205; Kellogg *v.* Malin, 67 Mo. 429. This would, of course, exclude evidence as to the effect of the incumbrance upon any special purpose or use peculiar to the owner which had not formed the basis of the contract. Hadley *v.* Baxendale, 9 Exch. R. 353; Greene *v.* Creighton, *supra;* Batchelder *v.* Sturgis, 3 Cush. (Mass.) 201; Wetherbee *v.* Bennett, 2 Allen, (Mass.) 430. In this last case the distinction was thus clearly noticed by Hoar, J.: "In Batchelder *v.* Sturgis it was held that evidence was inadmissible that the purchase was made with a *particular* view to a resale, and that the opinion of experts of the effect of the incumbrance upon a sale could not be given to the jury. In that case the incumbrance was a lease, and it was considered that an opinion upon the effect of a lease upon a sale would be, in its nature, imaginary and conjectural and therefore of no value. But in the case at bar the plaintiff was not allowed to show that he purchased the estate for the purpose of selling it again; and the incumbrance being an easement, which impaired the permanent value of the estate for all purposes and uses, the opinion of skilled witnesses *as to the difference in market value occasioned by the incumbrance* was rightly admitted. The fact that an estate can be sold is one of its elements of value, and is not to be excluded from consideration; though it is not to be considered as a reason for enhancing damages, that the purchaser acquired it for the special purpose of selling it again *directly*." Indeed, if such an element were admitted into the question of damages, no purchaser could ever be safe, because, except in the case of a lease and more especially that of an improving lease, or, what is for this purpose practically much the same thing, the sale of land upon a fee farm rent to be secured by the erection of buildings, the purpose for which the purchase is made, although communicated to the vendor, does not in general enter into the consideration between the parties. See *supra*, § 170.

the substance of the estate."[1] And in a recent English case, where the action was upon an express covenant for quiet enjoyment in a lease and the breach was the existence of a right of way, the court, though holding that without proof of the exercise of the right nominal damages only could be recovered, intimated that it would have been otherwise if the action had been on a covenant for the title.[2] So where the incumbrance was a party wall, built under an agreement between the covenantor and the owner of the dominant tenement, and for the use of which the covenantee was obliged to pay one half the cost, the measure of damages was said to be compensation for the depreciation in the value of the land occasioned by the agreement as a whole.[3]

If the incumbrance be an unexpired term of years, it has been held that "the extent of that term and the annual value, or the interest of the purchase money, should be the measure for damages;"[4] or as has been said more precisely, "in the case of an

[1] Wetherbee *v.* Bennett, 2 Allen, (Mass.) 429; Bronson *v.* Coffin, 108 Mass. 175; Kostendader *v.* Pierce, 37 Io. 645.

[2] Child *v.* Stenning, L. R. 11 Ch. Div. 82. "It has been held," said Jessel, M. R., "that where there has been eviction, so that you can never have another action under the covenant for quiet enjoyment but are evicted forever, there of course the damages must be assessed once for all. But where there has been no eviction, the damages are only the damages actually sustained; because you cannot tell what will happen in the future, or how far persons who have a right to interfere and disturb the quiet enjoyment may choose to avail themselves of that right, or whether they will interfere at all. That being so, the evidence ought to have been directed to show that some actual damage had been sustained by the plaintiff by reason of the interference of the Stennings by the exercise of their right of way before the issuing of the writ. On considering the evidence, I can find nothing of the kind. . . . There is the evidence of the surveyor as to the diminished value of the land as building land, which would be available, no doubt, if the action had been on a covenant for title, that is, a covenant that the vendor was seised or that the lessor had a right to convey, but which is not admissible in an action merely for breach of the covenant for quiet enjoyment. Beyond that there is really nothing in the shape of evidence. The result, therefore, must be that the damages will be the usual damages in an action to try a right, that is, it should be 40*s*."

[3] Mackey *v.* Harmon, 34 Minn. 168.

[4] Rickert *v.* Snyder, 9 Wend. (N. Y.) 423. The jury had on the trial been directed to assess the damages by the consideration money paid for that part from which the plaintiff had been evicted, which the Supreme Court said would have been correct if a breach of the covenant for seisin had been proved, but that the evidence went to the possession and not to the right of property. There was not, in fact, a covenant against incumbrances in the deed, the covenants being for quiet enjoyment and of warranty, but the case is here introduced as illustrative of the principle. In Batchelder *v.* Sturgis, 3 Cush. (Mass.) 205, the Supreme Court of Massachusetts, in referring to Rickert *v.* Snyder, said: "This rule may do justice in some, perhaps in many cases, but this court is not prepared to adopt it as a general rule. Where the incumbrance has been removed, the general rule in this court fixes the damages at the amount paid to remove the incumbrance. . . .

unexpired term or lease, the rule is the fair rental value of the land to the expiration of the term."[1] So where the premises were incumbered by a life estate, it was considered that the measure of damages was "the value of the estate for the time during which the purchaser was kept out of enjoyment by reason of the incumbrance;"[2] and when this time has not expired at the date of the trial, the ordinary life tables have been held admissible in evidence to show the value of the incumbrance.[3]

§ 192. In cases where the outstanding title or the incumbrance has been obtained or removed by purchase, it is considered that the plaintiff is entitled to recover the amount which he has fairly and reasonably paid for that purpose,[4] the burden of proof

The rule is that for such incumbrances as a covenantee cannot remove he shall recover a just compensation for the real injury resulting from the incumbrance. Though it is desirable to have as definite and precise rules upon the subject of damages as are practicable, it seems impossible to establish any more precise general rule in this class of cases. Cases must go to the jury for an assessment of damages on this general principle, and with such instructions as may be proper and applicable to the circumstances of each case. One of the modes in which the damages may be assessed is the annual value, and may perhaps be found to be the just rule in this case."

[1] Porter *v.* Bradley, 7 R. I. 542.

[2] Tierney *v.* Whiting, 2 Col. 620; Christy *v.* Ogle, 33 Ill. 295; and where, in McAlpin *v.* Woodruff, 11 Ohio, 120, the plaintiff, who was in possession under a lease for years renewable forever, had withheld one third of the rent in order to meet the assignment of dower to the lessor's widow of one third of the premises, it was held that his damages could be but nominal. See also *supra*, p. 92, n. 3; Terry *v.* Drabenstadt, 68 Pa. 400; Moreland *v.* Metz, 24 W. Va. 119. In Maine, it is provided by statute that in actions for breach of the covenant against incumbrances, if the incumbrance is a right of dower, its value shall be the measure of damages. Rev. Stat. 1883, p. 697, § 21.

[3] Mills *v.* Catlin, 22 Verm. 106.

[4] Cane *v.* Allen, 2 Dow, 296, per Lord Redesdale; McGary *v.* Hastings, 39 Cal. 360; Davis *v.* Lyman, 6 Conn. 255; Kelsey *v.* Remer, 43 id. 129; Amos *v.* Cosby, 74 Ga. 793; Snyder *v.* Lane, 10 Ind. 424; Burk *v.* Clements, 16 id. 132; Brandt *v.* Foster, 5 Io. 287; Baker *v.* Corbett, 28 id. 320; (Knadler *v.* Sharp, 36 id. 232, which appears to deviate somewhat from the line of previous decisions, is explained in Guthrie *v.* Russell, 46 id. 269;) Spring *v.* Chase, 22 Me. 505; Reed *v.* Pierce, 36 id. 455; Wyman *v.* Bridgen, 4 Mass. 150; Wyman *v.* Ballard, 12 id. 304; Chapel *v.* Bull, 17 id. 221; Tufts *v.* Adams, 8 Pick. (Mass.) 549; Brooks *v.* Moody, 20 id. 475; Comings *v.* Little, 24 id. 266; Batchelder *v.* Sturgis, 3 Cush. (Mass.) 205; Smith *v.* Carney, 127 Mass. 179; Coburn *v.* Litchfield, 132 id. 449; Henderson *v.* Henderson, 13 Mo. 152; City of St. Louis *v.* Bissell, 46 id. 157; Edington *v.* Nix, 49 id. 134; Walker *v.* Deaver, 5 Mo. App. 139; Willson *v.* Willson, 5 Fost. (N. H.) 235; Stewart *v.* Drake, 4 Halst. (N. J.) 141; Waldo *v.* Long, 7 Johns. (N. Y.) 173; Delavergne *v.* Norris, id. 358; Hall *v.* Dean, 13 id. 105; Stanard *v.* Eldridge, 16 id. 254; Baldwin *v.* Munn, 2 Wend. (N. Y.) 405; Funk *v.* Voneida, 11 Serg. & Rawle, (Pa.) 112; Brown *v.* Brodhead, 3 Whart. (Pa.) 104; Druson *v.* Love, 58 Tex. 468; Hurd *v.* Hall, 12 Wis. 112; Bailey *v.* Scott, 13 id. 620; Eaton *v.* Tallmadge, 22 id. 528. It is provided by statute in Massachusetts (Pub. Stats. 1882, ch. 126, § 18) and Minnesota (Gen. Stats. 1878, ch. 40, § 35) that for removing

being upon him to show what the outstanding title or incumbrance was really worth, the mere fact of payment being, in general, no evidence whatever of this,[1] and in the absence of such evidence it seems that only nominal damages can be recovered.[2]

what appears of record to be an incumbrance, but is not such in fact, the covenantee may recover damages sustained in removing it. Hawthorne *v.* City Bank, 35 Minn. 382 ; *supra*, p. 118.

[1] Walker *v.* Deaver, 5 Mo. App. 139. In Lawless *v.* Collier, 19 Mo. 480, Collier had, for the consideration of $2,668, sold certain land to Gamble, with a covenant for seisin. Gamble subsequently conveyed this title to Mills, and afterwards discovered a paramount title in the heirs of Stoddard, which was then held by one Lawless, and which he purchased for the sum of $1,000 *and the assignment to Lawless of his (Gamble's) right of action against Collier.* By means of such purchase Gamble was enabled to perfect the title which he had conveyed to Mills, and suit was then brought against Collier upon this covenant for seisin in the name of Gamble to the use of Lawless. The court below held that the measure of damages was the sum paid by Gamble to Lawless for the estate he thus acquired with interest, but this instruction was reversed on writ of error. "We cannot say that Lawless," said Scott, J., who delivered the opinion, "in making a sale of his land, did not regard the covenants of Collier as worth the full sum which they were given to secure. He did not convey to Gamble the identical land that Gamble had conveyed to Mills. His conveyance of itself did operate but partially to secure Gamble, and thereby destroy his recourse against Collier for his purchase money. It was by acts of Gamble, subsequent to Lawless's conveyance, that his vendee's title was perfected. What right had Gamble then to adopt a course of conduct which would have impaired the recourse of Lawless's trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless ? In so doing he would have injured the plaintiff, and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless for the destruction of the right which he had assigned for her benefit ? This is the consequence flowing from holding that the $1,000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrong-doer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those to whom he was under obligations to indemnify. Is it not more just that Collier should refund the money he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another ? No one can say that without the assignment of the covenants in Collier's deeds, Gamble ever would have been enabled to obtain Lawless's interest in the Stoddard claim. We know not how those covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure." It should be observed that where in the above opinion the court speak of the assignment by Gamble of the covenants in Collier's deeds, it meant the assignment of the right of action upon those covenants — of the right to use Gamble's name in a suit against Collier ; for the covenant for seisin, being held in America to be broken as soon as made, is of course incapable of direct assignment. This will appear from the previous report of the case in 10 Mo. 466 (Gamble *v.* Collier), which should be read in connection with the above opinion.

[2] Harlow *v.* Thomas, 15 Pick. (Mass.) 69 ; Anderson *v.* Knox, 20 Ala. 156 ; Dickson *v.* Desire, 23 Mo. 167 ; Walker *v.* Deaver, 5 Mo. App. 139 ; Pate *v.* Mitchell, 23 Ark. 590.

§ 193. But the proposition that the plaintiff is entitled to recover the amount which he has thus paid must, it seems, be taken with the qualification that this amount cannot exceed the consideration money and interest in those States in which, on the covenants for quiet enjoyment and of warranty, the limit of damages is the same as on the covenant for seisin.[1]

[1] This was first decided in Dimmick *v.* Lockwood, 10 Wend. (N. Y.) 142, where the application of the rule was one of some hardship. The premises had been conveyed by two tenants in common to the plaintiff, in consideration of $250. He made improvements which increased the value of the land to $2,000, and afterwards one half of this property was sold under an execution upon a judgment for $3,344, which was held against one of the tenants in common. The plaintiff brought an action on his covenant against incumbrances, in which the defendants in their plea tendered the sum of $125, the half of the consideration money paid, and contended that this must be the limit of damages. The plaintiff urged that he was entitled to recover an amount sufficient to indemnify him for the loss he had sustained, and that inasmuch as, under the authorities just referred to, he would have been entitled in case he had paid the amount of the judgment to recover what he had thus paid, he should be allowed damages to the amount of the incumbrance, without regard to the amount of the consideration money. It was said by the court that no similar case was to be found in the books. Those arising on covenants against incumbrances had been cases where the incumbrance was less than the consideration money, and in them there was little difficulty. But it had been often and conclusively settled that a purchaser could not increase his damages by reason of improvements, which the plaintiff would indirectly seek to do by the doctrine contended for. "It may be asked," said Savage, C. J., who delivered the opinion, "to what extent may a purchaser go under such circumstances in creating a claim against his vendor? Suppose the plaintiff, instead of building a house, had paid $3,000, and brought this suit to be reimbursed, he would bring himself within the language of some of the judges who say that a purchaser is entitled to recover what he has paid, and yet I apprehend he would not be permitted to recover that amount. But suppose again, what is probably the real state of this case, two persons are tenants in common of an acre of ground worth $100, one a wealthy man and the other insolvent; being tenants in common, they unite in a conveyance with the usual covenants; can the purchaser pay a lien of $3,344, a debt due by the insolvent, and recover it from his tenants in common, who may have no earthly connection with him? I state this case hypothetically, to show how the rule contended for by the plaintiff may work the height of injustice to a mere stranger. . . . Among all the cases cited, there is none in our own court where the purchaser has been permitted to recover beyond the consideration, and interest and costs. There is none in Massachusetts, where, under the covenant against incumbrances, the purchaser has recovered any more, though there the rule allows a recovery for the value at the time of eviction. All the reasons of our own judges go to limit the responsibility of the grantor to the consideration with interest and costs, and I am unwilling to go further where the principles to be established may lead to great injustice."

The subsequent case in Ohio of Foote *v.* Burnet, 10 Ohio, 334, was decided upon the same principle. The consideration paid was $1,020, and the purchaser had extinguished an incumbrance amounting to $1,773.95, which sum he claimed as his measure of damages. But it was said by the court, "If this be correct, then upon this covenant a recovery to a much greater amount may be had than upon the covenant of warranty, which is ever considered the principal covenant in a deed. . . . If in the present action, he can re-

While it seems to have been correctly stated in Dimmick *v.* Lockwood that there had been, at that time, no case actually decided in Massachusetts where the purchaser had been suffered to recover more than the consideration money for a breach of the covenant against incumbrances, yet judging from the remarks in recent cases in that State and others in New England where upon the covenants for quiet enjoyment and of warranty the value of the land at the time of eviction forms the measure of damages, there can be little doubt that in a case similar to Dimmick *v.* Lockwood the limit of the recovery would be extended beyond the consideration money and up to the value of the land, and however this might be in case the covenant against incumbrances were the only one in the conveyance,[1] there would be no doubt

cover this amount with interest, he recovers more than he would have done had he entirely lost the land. There would seem to be some inconsistency in this." After referring to the case of Dimmick *v.* Lock wood, it was said : "After full consideration and careful examination, we have been led to the conclusion that the law is as laid down in this case, that the true measure of damages in an action for the breach of the covenant against incumbrances is the amount paid to remove the incumbrance, with interest, provided the same do not exceed the purchase money and interest. But in no case can a purchaser recover greater damages for the breach of any of the ordinary covenants in his deed than for a breach of the covenant of warranty." And the rule laid down in Dimmick *v.* Lockwood has been since affirmed in New York, and approved elsewhere. Kelsey *v.* Remer, 43 Conn. 139 ; Brady *v.* Spurck, 27 Ill. 482 ; Richards *v.* Iowa Homestead Co., 44 Io. 304 ; Willson *v.* Willson, 5 Fost. (N. H.) 229 ; Grant *v.* Tallman, 20 N. Y. 191 ; Andrews *v.* Appel, 22 Hun, (N. Y.) 429 ; Cox *v.* Henry, 32 Pa. 21.

In California and Dakota, it is provided by statute : "The detriment caused by the breach of a covenant against incumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach, as compared with the whole, or, in the latter case, interest on a like amount." 1 Hittell's Codes and Stats. of Cal., 1876, p. 876, § 8305 ; 2 Levisee's Rev. Codes of Dak., 1883, p. 1106, § 1952.

[1] In Chapel *v.* Bull, 17 Mass. 221, no question arose as to increased value of the land. One of two tenants in common sold his undivided half, covenanting against incumbrances, while proceedings in partition were pending under which the premises were subsequently sold and a deed made to the purchaser. In an action on the covenant against incumbrances, it was held that the measure of damages was the whole consideration money and interest. (*Accord.* Willson *v.* Willson, 5 Fost. (N. H.) 236.) This case, therefore, obviously decided, as was subsequently said in Jenkins *v.* Hopkins, 8 Pick. (Mass.) 349, that "on a breach of the covenant against incumbrances, where the incumbrance was changed into a title adverse and indefeasible, the plaintiff was entitled to recover the money he had paid for the land, with interest. For in such case the estate conveyed is entirely defeated, and the purchaser cannot remove the incumbrance, nor can he enter upon and enjoy the land ; and it would be idle to require him to purchase it, in order that he might be entitled to his damages for the breach

that if it were accompanied with a covenant for quiet enjoyment or of warranty the damages would be assessed as for a breach of those covenants, and by that means the purchaser receive allowance for improvements.[1]

§ 194. As to the measure of damages upon a breach of the covenant for further assurance there is little authority to guide us, redress upon this covenant being generally sought in equity.[2] In the case of King *v.* Jones,[3] a woman being seised of certain premises mortgaged them for £300. She subsequently married, and her husband and herself, in consideration of £300 paid to

of the covenant against incumbrances. Indeed, such a state of facts comes very near proving an actual eviction, and falls short of it only because there has been no actual possession by the grantee, so that he cannot be evicted. And this constitutes a difference between cases of this kind and the common cases of mortgage, attachment, or rights of dower, which may be removed by the grantee, and the amount of his damages ascertained in that way. The principle, which constitutes a difference between the case of Chapel *v.* Bull and the cases in which it has been held that for a breach of the covenant against incumbrances nominal damages only can be recovered unless the incumbrance had been removed, is that in the latter case the plaintiff is in possession of the estate, is undisturbed in the enjoyment, and may remain so; whereas in the former case, and that now before us, the plaintiff is not in possession, nor can he enter without being a trespasser upon one who has the title, and who is presumed to be in possession according to his title." At the present day, however, the facts in Chapel *v.* Bull would, according to the weight of authority, clearly amount to an eviction.

[1] Norton *v.* Babcock, 2 Met. (Mass.) 519 (see this case, *supra*, p. 256, note); Elder *v.* True, 32 Me. 104.

Mr. Sedgwick considers the decision in Dimmick *v.* Lockwood to be open to much observation, and greatly to diminish the value of the covenant against incumbrances. "By surrendering the property to the previous incumbrance, a valid claim may always be created, to the extent of the consideration money, and to this it seems the recovery under this covenant is in every instance to be limited. A case may, however, easily be imagined, where the incumbrance is well known, where the consideration money is a fair representative of the value without the incumbrance, where the grantor agrees to remove it, and the covenant against incumbrances is inserted for the express purpose of making it certain that he will do so. In such a case the application of this principle would be extremely inequitable. For it must not be forgotten that the severity of the arbitrary rule which declares the consideration named in the deed to be the actual price paid, is but little mitigated by the permission given to the parties to contradict it by parol proof. Such evidence, after the lapse of a few years, will generally be difficult of production, in many cases impossible, and the mere burden of proof is always a serious responsibility." 1 Sedgwick on Damages (7th ed.), 359. It may be observed, however, that when the incumbrance is greater than the consideration money, the damage to the purchaser can never exceed the amount of the latter, unless, as in Dimmick *v.* Lockwood, he has made valuable improvements or the land has increased in value, in both of which cases we have seen that the decisions in New York and in most of the States allow no increase of damages by reason of those circumstances, and it seems, therefore, rather with this doctrine than with the decision in that case that fault should be found.

[2] *Infra*, Ch. XV.

[3] 5 Taunton, 418.

the mortgagee and of £855 paid to themselves, joined with the mortgagee in the conveyance of the premises, by deed of lease and release to the plaintiff's ancestor, the husband covenanting for himself and his wife for further assurance. This conveyance was of course inoperative to pass the title of the wife, by reason of no fine being levied for that purpose. After the death of the wife, her devisee filed a bill against the plaintiff, who was the heir of the grantee under this conveyance, praying to be let into possession, and that the plaintiff should be decreed to convey the same to him on payment of what might remain due of the £300, after accounting for the rents and profits, and a decree and reconveyance were made accordingly, upon which the plaintiff brought suit against the executor of the husband, who had been the covenantor in the deed. On the trial it appeared that the grantee had, in his lifetime and in that of the wife, requested the husband to procure the fine to be levied, which the latter during a course of eighteen months assured him was being done. A verdict was found for £955, consisting of £855 — so much of the purchase money as the plaintiff had not been repaid as assignee of the mortgage under the decree — and £100 interest; upon which the defendant moved first, in arrest of judgment, on the ground that the breach having been in the lifetime of the ancestor, the damages belonged not to the heir but to the executor; and secondly, in reduction of damages, that the plaintiff was not entitled to the £100 interest, for it was the plaintiff's own laches that he did not sue instantly on the eviction, in which case no interest would have accrued. Upon the last point, the court observed that the plaintiff was entitled upon this same declaration to recover damages for all the time past during which he had been kept out of the possession of the estate, and therefore, as he would be entitled to an equivalent or greater sum under another name, it would be useless to grant a rule upon that ground;[1] and upon the motion in arrest of judgment, it was decided that the ultimate damage not

[1] In the course of the argument, Mansfield, C. J., said: "In the present case the ancestor might have sued and could have recovered the whole value of the estate; at this time of day there could have been no difficulty upon that point." But in delivering the opinion of the court, Heath, J., said: "The ancestor paid his purchase money, relying on the vendor's covenant; he required him to perform it, but gave him time and did not sue him instantaneously for his neglect, but waited for the account. He was to do so until the ultimate damage was sustained, for otherwise he could not have recovered the whole value."

having been sustained in the time of the ancestor, the action remained to the heir (who represented the ancestor in respect of land, as the executor did in respect of personalty) in preference to the executor.[1]

§ 195. It is presumed that on this side of the Atlantic, if the analogy to the rules which govern the measure of damages on the other covenants for title were observed, the mere refusal to execute the further assurance would not of itself entitle the plaintiff to more than nominal damages, unless it should appear that by such refusal the plaintiff had sustained the ultimate damage that might ever occur to him by reason of it.[2]

§ 196. Interest upon the amount of the consideration money is allowed to the plaintiff as part of his damages, in order to counterbalance the claim for mesne profits which the owner of the paramount title may recover.[3]

Every endeavor is, however, made by the courts to limit the recovery of interest within the bounds of a recovery of the mesne profits by the true owner.[4]

Thus if a statute of limitations prevent a recovery of these for more than a certain number of years back, interest will be allowed for no longer time,[5] and although, in a case in Massachu-

[1] This part of the case — the question whether the heir or the executor is the party entitled to sue upon the covenants for title — is considered *infra*, Ch. X.

[2] This was so stated by the court in Burr *v.* Todd, 41 Pa. 213, but only on the authority of the text, and it was not one of the points decided in the case.

[3] Reese *v.* McQuilkin, 7 Ind. 452; Brandt *v.* Foster, 5 Io. 295; McNear *v.* McComber, 18 id. 12; Sumner *v.* Williams, 8 Mass. 222; Partridge *v.* Hatch, 18 N. H. 494; Staats *v.* Ten Eyck, 3 Caines, (N. Y.) 111; Winslow *v.* McCall, 32 Barb. (N. Y.) 241; Downer *v.* Smith, 38 Verm. 464.

[4] Kyle *v.* Fauntleroy, 9 B. Mon. (Ky.) 620; White *v.* Tucker, 52 Miss. 145; Partridge *v.* Hatch, *supra;* Guthrie *v.* Pugsley, 12 Johns. (N. Y.) 126; Winslow *v.* McCall, *supra,* Williams *v.* Beeman, 2 Dev. (N. C.) 485; Patterson *v.* Stewart, 6 Watts & Serg. (Pa.) 528; Flint *v.* Steadman, 36 Verm. 210; Downer *v.* Smith, 38 id. 464; Rich *v.* Johnson, 1 Chand. (Wis.) 20.

[5] Lawless *v.* Collier, 19 Mo. 486; Ela *v.* Card, 2 N. H. 175; Caulkins *v.* Harris, 9 Johns. (N. Y.) 324; Bennett *v.* Jenkins, 13 id. 50; Clark *v.* Parr, 14 Ohio, 118. In Patterson *v.* Stewart, 6 Watts & Serg. (Pa.) 527, the statute of limitations does not appear to have been applied. The plaintiff had in 1817 purchased a lot which was subject to an incumbrance, under which it was sold in 1822. No possession was, however, taken by the sheriff's vendee till 1831. In an action on the covenant against incumbrances, implied by the words "grant, bargain, and sell," and on the covenant of warranty, the plaintiff contended that the former covenant being broken as soon as made, he was entitled to interest from the year 1817, while the defendant urged that he should be responsible only from the year 1831, when possession was taken. The court, however, properly decided that neither of

setts,[1] it was denied that any such limitation of the allowance of interest had ever been sanctioned in that State, yet it was suggested by the court and acquiesced in by counsel that the equitable rule of damages would be to allow the plaintiff to recover the purchase money so far as there was no seisin, with interest, deducting the profits received by him for which he was not responsible to his co-tenants in common.[2]

these positions was correct. Apart from the non-application of the statute of limitations, this decision is perfectly sound and the statute may not have been pleaded; and in the later case of Cox *v.* Henry, 32 Pa. 19, this decision was cited as supporting the position that the statute of limitations protected the purchaser against the claim for mesne profits except for the six years immediately before the commencement of the action, and it was held that interest upon the consideration money was recoverable to the extent of the mesne profits.

The same rule was applied in Kyle *v.* Fauntleroy, 9 B. Mon. (Ky.) 620, where the defendant's intestate had in 1807 conveyed land to which no title could be shown out of the Commonwealth, who had, in 1838, patented it to other parties. The plaintiff's intestate had been in possession since the date of his deed, and it was held that "he was not entitled to interest while he could not be disturbed in the use of the land, and as he was not liable to any one for rents or waste until the issuing of the patent," interest was therefore only allowed him from the date of the patent.

[1] Whiting *v.* Dewey, 15 Pick. (Mass.) 428.

[2] In Spring *v.* Chase, 22 Me. 502, the plaintiff had been obliged, about seventeen years after his purchase, to buy in an outstanding paramount title, and the court held that he was entitled to recover the amount paid by him to perfect the title, with interest from the time of this payment. In opposition to the claim for interest, the defendant urged that during no time had the plaintiff actually received any rents or profits from the premises; but the court said that whether the vendee turned his purchase to a profit or a loss was no concern of the vendor, since, "if a person purchase real estate, it is to be presumed that he does so because its rents and profits will be equivalent to the interest of the money he may be content to pay for it." This case, it will be observed, so far from impugning the rule already mentioned with respect to interest, which at first sight it might appear to do, is in strict accordance with it, since the plaintiff was allowed no interest before the time when he bought in the outstanding title, because in so doing he left no one who could claim the mesne profits, he having purchased the whole title; while he *was* allowed interest *from* that time, because that might be presumed equal to the rents and profits he had a right thenceforth to expect. But in Lawless *v.* Collier, 19 Mo. 486, these views were considered to be subject to much qualification when applied to unimproved land. "In this State many invest their money in unimproved lands, relying on the increasing value of the land as an equivalent for the interest of the money invested. Purchases may also be made in which this latter inducement may be blended with a desire to obtain land but partially improved. In case, therefore, of unimproved land, it would be unjust to say in this State, as has been said elsewhere, that whether the vendee turned his purchase to a profit or a loss was no concern of the vendor, since if a person purchase real estate it is to be presumed that he does so because its rents will be equivalent to the interest of the money he may be contented to pay for it. These considerations show the difficulty of prescribing any fixed rule in relation to the interest that is to be recovered in suits on covenants for seisin. When the possession obtained by the vendee by reason of his purchase has been beneficial, and

It is evident, however, that so far as this allowance of interest is concerned, the plaintiff must to some extent recover from his covenantor a certain compensation for a loss which has not actually happened, unless in the single case where the paramount owner has, prior to the recovery upon the covenant, actually recovered the mesne profits from the covenantee. Mr. Sedgwick has remarked as to this, "It may still be doubted whether interest should be allowed in any case where the property has been enjoyed by the grantee, unless he has been actually compelled to pay the mesne profits.[1] Interest is given to counterbalance the claim of the true owner for mesne profits, but even after eviction the loss of the mesne profits does not necessarily follow, as we have heretofore seen the law does not give actual compensation for probable loss."[2] The law has, however, been otherwise held in a rather late case in New Hampshire, where it was said: "The profits of the land may be more or less than the interest money, and the real owner may or may not demand the mesne profits. And on account of these uncertainties, it is impossible to establish a rule which will operate with perfect equity in all cases. But the rule which is most reasonable and which will generally work the least injustice, seems to be founded upon the presump-

he has not been and it can be seen with certainty that he will not be liable over to the real owner for the rents and profits, it would be unjust to allow him full interest on the purchase money. Where the possession has not been beneficial, and it may be inferred that it is contemplated by the parties that it would not be so, justice requires that interest should be allowed from the time of the payment of the purchase money." In Anderson *v.* Arrowsmith, 2 Perry & Dav. 408, the vendor had, on the sale of a life estate, given a covenant for quiet enjoyment and a bond of indemnity with sureties against all costs and claims, and the plaintiffs having averred that they had been obliged to pay a prior annuity which had been charged upon the land, and given the holder a right to enter for non-payment, claimed to recover back the amount thus paid with interest for some years; it was left to the jury to say whether they had not been guilty of negligence in not proceeding against the sureties until after they had become insolvent, and the jury having found that they might have recovered from the sureties, the interest was not allowed, Denman, C. J., saying, "If promptly obtained from the surety and promptly repaid out of the defendant's estate, no interest might have become due at all, and we cannot say that would not have been the most gainful course for the defendant." In Blake *v.* Burnham, 3 Wms. (Verm.) 437, it was held that interest was only recoverable according to its legal rate, without regard to the amount of interest which the plaintiff had agreed to pay or the securities given by him for the purchase money; and in Drew *v.* Towle, 10 Fost. (N. H.) 536, it was decided that interest could never be recovered by making rests at stated periods, but that simple interest alone was recoverable.

[1] Benton *v.* Reeds, 20 Ind. 91; Hutchins *v.* Roundtree, 77 Mo. 500; and Wacker *v.* Straub, 88 Pa. 32.

[2] 1 Sedgwick on Damages (7th ed.), 338, n.; Field on Damages, § 466.

tion that the profits and interest are equal, and that mesne profits will be recovered by the owner."[1] And indeed, if a recovery of mesne profits were refused because they had not been yet recovered from the covenantee, and judgment should thereby be entered for the defendant, it could be pleaded in bar of any subsequent action on the covenant.[2]

§ 197. It often happens that a purchaser is reluctant to abandon his purchase to a paramount claimant without a struggle, especially if it has an increased value which cannot enter into his measure of damages, and the question arises, How far can the costs and expenses of litigating the title be included in the damages to be recovered upon the covenants?

§ 198. Such expenses may be divided into three classes: first, the taxed costs of suit; secondly, counsel fees; and thirdly, personal expenses; and as to some or all of these there are cases which seem to decide that the right to recover them depends upon notice of the adverse action being given to the covenantor; there are others which support or deny such recovery independently of the question of notice, and others again which make the recovery dependent upon the answer or want of answer of the covenantor to such notice.

So far as the taxed costs of suit are concerned, it is settled in England that as it would be expecting too much of a purchaser to decide at his peril on the validity of a title set up in opposition to that which his vendor undertook to convey, the former should be allowed, by way of damages, the taxed costs of any action by which he has reasonably sought to defend that title.

Thus in Smith *v.* Compton,[3] judgment on demurrer having been given for the plaintiff in an action on a covenant for good right to convey,[4] the jury, on a writ of inquiry of damages, included the sum of £550, which the plaintiff had been obliged to pay by way of compromise to the paramount claimant, together with the plaintiff's costs as between attorney and client of the action brought by such claimant, it was urged first, that the

[1] Foster *v.* Thompson, 41 N. H. 373.

[2] See *supra*, § 177. To the same effect are the remarks of Underwood, J., in Combs *v.* Tarlton, 2 Dana, (Ky.) 467, which were quoted at length in the fourth edition of this treatise, p. 303 *et seq.*

[3] 3 Barn. & Adolph. 407, often cited as a leading case in England. In the previous case of Pomeroy *v.* Partington, 3 Term, 678, it appears by a note that the costs of an ejectment had been recovered as a matter of course.

[4] 3 Barn. & Adolph. p. 189, and see the case noticed *infra*, Ch. XII.

plaintiff was not entitled to recover what he had paid by way of compromise, having taken that step without notice to the covenantors, because the latter, had they had notice, might have settled the action upon better terms; secondly, that without such notice he ought not to have recovered the costs which he paid his own attorney for defending the action, because they might have been less if the defendants had had the opportunity of bringing the cause to an earlier conclusion; and thirdly, the costs at all events should have been reckoned as between *party and party*, and not as between attorney and client;[1] and a decis-

[1] These English cases can only be understood by observing the distinction which, before the judicial discretion given by the Judicature Acts (as to which see Wilson's Judicature Acts, 4th ed. 525), existed between "costs between party and party" and "costs as between solicitor and client." The former are thus referred to in the Chancery Orders of 14th February, 1860: "Where costs are to be taxed as between party and party, the taxing master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in the service and execution of writs, and the service of orders, notices, petitions, warrants, and summonses; advising with counsel on the pleadings, evidence, and other proceedings in the cause; procuring counsel to settle and sign pleadings and such petitions as may appear to be proper to have been settled by counsel; procuring consultations of counsel; procuring the attendance of counsel in judges' chambers, or in the masters' offices, where the judge or master has certified the case to be proper for counsel to attend; procuring evidence by deposition or affidavit, and the attendance of witnesses; and supplying counsel with copies of or extracts from necessary documents. But in allowing such costs, the taxing master shall not allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party."

"This extract," says a leading English solicitor, "shows what would be allowed as between party and party, that is to say, the costs of the proceedings themselves, such as the pleadings and steps taken in court or before the officials, and necessary to enable the same to be brought to a hearing. But costs as between solicitor and client mean everything which can be charged in a lawyer's bill, including of course all his attendance upon his client or other people with reference to the business; all his correspondence and all his charges for time and labor devoted to the interest of his client. But there is a further distinction in the sense of the expression 'costs as between solicitor and client,' where the costs have to be paid by a third person, not being the client himself; as for instance in the common case of the costs of a trustee, which are paid to the solicitor, not by the trustee himself but out of the fund belonging to the *cestui que trust*, there the solicitor for the trustee would not get every charge allowed out of the fund as of course. Say that the trustee in his character of defendant in a suit by his own delay suffers himself to be put into contempt, it is quite fair that he and not his *cestui que trust* should bear the expense of his neglect; though as between the trustee and the solicitor employed by him the trustee would be liable for the costs of purging the contempt. Again as between party and party the rule is not to allow more than two counsel, but as between solicitor and client five counsel, if retained by the instructions of the client, would be allowed. The taxing masters, moreover, exercise a discretion as to the amount of

ion of Lord Tenterden at Nisi Prius[1] was relied upon to the effect that "a man has no right, merely because he has an indemnity, to defend an action and to put the party guaranteeing to a useless expense," but the court held, "The only effect of want of notice in such a case as this is to let in the party who is called upon for an indemnity to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged; that he made an improvident bargain; and that the defendant might have obtained better terms if the opportunity had been given him. This was not proved here, and we cannot assume it. As to the costs, the plaintiff here had a right to claim an indemnity, and he is not indemnified unless he receives the amount of the costs paid by him to his own attorney."[2]

In a recent case in the Exchequer,[3] where the premises had been leased with a covenant for quiet enjoyment, an action of trespass was brought against the lessee by the holder of the paramount title. Several notices of the action were given by the lessee to the lessor, who paid no attention to them and gave no express authority to defend the action, which nevertheless the lessee did and called the lessor as a witness therein. A verdict for forty shillings damages having been found against the lessee, the latter sued his lessor on the covenant, and was allowed by the jury these damages, and the costs, £57 10*s.* 6*d.*, and "his own expenses," £70,[4] and this verdict was sustained by the court in banc.

§ 199. On this side of the Atlantic, except in Ontario where

counsel's fee in party and party taxation, and only allow such a sum as they think reasonable; whereas as between solicitor and client they have no discretion and must allow the fee paid. . . . As a general rule, the costs, say of an action for debt, in which there are half a dozen witnesses to examine and two counsel are retained, would, with regard to the difference as between party and party and solicitor and client, be about two thirds." It is familiar that the costs as between attorney and client often amount to tens of thousands of pounds.

[1] In Gillett *v.* Rippon, 1 Mood. & Malk. 406.

[2] Per Tenterden, C. J. Parke, J., in concurring, quoted the language of Buller, J., in Duffield *v.* Scott, 3 Term, 374: "The purpose of giving notice is not in order to give a ground of action; but if a demand be made, which the person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money."

[3] Rolph *v.* Crouch, L. R. 3 Exch. 44; and the same rule was applied in the subsequent case of Howard *v.* Lovegrove, 6 id. 43.

[4] That is to say, his own expenses incurred in defending the action brought by the holder of the paramount title.

the English rule seems to prevail without qualification,[1] counsel fees, beyond amounts so small as to be almost nominal, are seldom, if ever, included in what are termed "taxed costs." Such costs have, however, been held, in many cases, to be recoverable as part of the *damages*, although no notice of the adverse suit may have been given to the covenantor.[2]

§ 200. Both with respect to counsel fees and such other expenses as are called variously in the cases "necessary expenses," "reasonable costs attending litigation," "compensation for trouble and expenses," and the like, these have in some cases been refused unless notice has been given,[3] and in others allowed where notice has been given,[4] in others irrespective of

[1] Trust & Loan Co. *v.* Covert, 39 U. Can. Q. B. 327, where the authorities are elaborately reviewed.

[2] Cox *v.* Strode, 2 Bibb, (Ky.) 273; Barnett *v.* Montgomery, 6 T. B. Mon. (Ky.) 332; Kyle *v.* Fauntleroy, 9 B. Mon. (Ky.) 622; Robertson *v.* Lemon, 2 Bush, (Ky.) 302; Sumner *v.* Williams, 8 Mass. 162; Leffingwell *v.* Elliott, 8 Pick. (Mass.) 457; Stewart *v.* Drake, 2 Halst. (N. J.) 141 (in Holmes *v.* Sinnickson, 3 Gr. (N. J.) 313, it was said "costs and counsel fees taxed in the fee-bill, and no others"); Pitcher *v.* Livingston, 4 Johns. (N. Y.) 1; Waldo *v.* Long, 7 id. 174; Bennett *v.* Jenkins, 13 id. 51; Reichert *v.* Snyder, 9 Wend. (N. Y.) 423; Pitkin *v.* Leavitt, 13 Verm. 379, affirmed in Keeler *v.* Wood, 30 id. 242. In Morris *v.* Rowan, 2 Harr. (N. J.) 306, the court did not find, after looking at all the authorities, that the question whether costs should be allowed as damages had ever been made to depend on the fact of notice by the covenantee to the covenantor of the suit by which the former was evicted. "If notice of the suit had been given to these defendants, and they had either declined to interfere, or had unsuccessfully aided the plaintiff in his defence, it must be admitted that they would not only have been liable for the costs, but would also have been concluded by the judgment of eviction. But suppose the defendant, conscious of the unsoundness of the title, had not only refused to defend the suit, but had given notice to the tenant that if he made any defence he must do it at his own risk and expense, would that have availed him anything? I think not. It would place a grantee in hazardous circumstances, if upon such an intimation from his grantor he must either defend at his own expense, or abandon the title and look for compensation in damages under his covenants. On the contrary, I am of opinion that notwithstanding such notice from the covenantor the grantee would have a right to recover from him the taxable costs he had incurred in honestly and fairly resisting the claim of title set up by the plaintiff in the ejectment." "If," added Ford, J., "the warrantor, on learning that his title was defective, should make an admission of the fact, and request the covenantee not to run him to costs by making a useless defence, perhaps it might prove an exception to the general rule." In Swett *v.* Patrick, 3 Fairf. (Me.) 10, it seems to have been thought by the court that as the covenantor had been notified, the costs were *therefore* recoverable; but the cases generally do not recognize this distinction, and as it is well settled that the absence of notice does not preclude the recovery of damages upon the covenant, but only increases the burden of proof on the covenantor (*supra*, § 125), it would seem equally to follow that the absence of notice should not preclude the recovery of costs. In Louisiana, where the civil law prevails, the law seems otherwise. Bach *v.* Miller, 16 La. An. 44.

[3] Crisfield *v.* Storr, 36 Md. 151.

[4] Harding *v.* Larkin, 41 Ill. 420; Mc-

notice,[1] and in others where no notice has been given.[2] In some cases, however, counsel fees have been denied under any circum-

Kee *v.* Bain, 11 Kans. 569 ; Williamson *v.* Williamson, 71 Me. 442 ; Haynes *v.* Stevens, 11 N. H. 28, affirmed in Kingsbury *v.* Smith, 13 id. 125 ; Lane *v.* Fury, 31 Ohio, 574 ; Rowe *v.* Heath, 23 Tex. 620. (In Levitzky *v.* Canning, 33 Cal. 308, where the covenant for quiet enjoyment was contained in a lease, the paramount title had been asserted by the covenantor himself.) In Wimberly *v.* Collier, 32 Ga. 13, the covenantor, upon being notified, had by his own counsel defended the suit, and it was held that the covenantee could not recover fees for associate counsel employed by himself. So in Kennison *v.* Taylor, 18 N. H. 220, the covenantee was allowed "his expenses in defending the action upon which he was evicted, including counsel fees among those necessary expenses, and a reasonable remuneration for his personal trouble and pains. But any measures that he has seen fit to pursue for his personal protection, after his covenantor has come into court upon notice and assumed the defence, are voluntary. If he chose to incur the expense he cannot call upon the covenantor for indemnity."

[1] Robertson *v.* Lemon, 2 Bush, (Ky.) 303 ; Drew *v.* Towle, 10 Fost. (N. H.) 531 ; Rickert *v.* Snyder, 9 Wend. (N. Y.) 416 ; Keeler *v.* Wood, 30 Verm. 242 ; McAlpin *v.* Woodruff, 11 Ohio, 130. In Swartz *v.* Ballou, 47 Io. 188, it was held that it must not be enough for the plaintiff to show that the counsel fees were reasonable, but also that he had paid them or was under obligation to pay them, it being analogous to the case of an incumbrance. In Stark *v.* Olney, 3 Ore. 88, the covenantee claimed against his covenantor the costs and counsel fees in a suit brought against the former by one to whom he had himself conveyed with covenants, and it was held that these could not be recovered. "This claim is clearly distinguishable from a claim for expenses incurred in defending against eviction." In Dale *v.* Shively, 8 Kans. 276, the court said : "The limit to which courts have gone in holding the grantor, after breach of his covenant of seisin, responsible for costs and counsel fees paid by the grantee, is this : he may be charged with the costs and counsel fees paid by the grantee in defending the title conveyed against a suit by the true owner, or in prosecuting a suit to obtain the possession which had been covenanted but never actually given. Beyond this, we think the authorities have not gone nor ought they to go. Damages beyond this are too remote to be included. They could not have been contemplated by the parties at the time of making the covenant. The grantor could foresee that if he did not deliver possession to the grantee the latter might be compelled to bring suit to determine his right to possession, and that if he did deliver possession a claimant would inevitably bring suit to settle his rights. For these manifest contingencies, he should be held to have provided by his covenant of seisin. But he could not foresee all the possible sales and exchanges which his grantee might make, nor be held to have covenanted to save him harmless in suits growing out of such sales and exchanges."

[2] Ryerson *v.* Chapman, 66 Me. 557 ; Sumner *v.* Williams, 8 Mass. 162 ; Leffingwell *v.* Elliott, 8 Pick. (Mass.) 457 (where, however, counsel fees were denied) ; Pitkin *v.* Leavitt, 13 Verm. 379, affirmed in Turner *v.* Goodrich, 26 id. 709. In Leffingwell *v.* Elliott, 10 Pick. (Mass.) 204, the court held that if the plaintiffs "were put to trouble and expense in procuring the extinguishment [of the paramount title], that was a proper ground of damages," and the auditor to whom it was referred to estimate these classified the plaintiff's claims under three heads : first (besides the amounts paid to extinguish the adverse title, with interest from their payment), charges for the plaintiff's time while thus employed, for horses, carriages, board, and counsel fees, with interest on each from the service of the writ in the action on the covenant ; secondly, similar charges subsequent to the service of the writ, not however including counsel fees ; and thirdly, expenses of

stances,[1] it being considered that "these expenses, incurred by the party for his satisfaction, vary so much with the character and eminence of counsel, that it would be dangerous to impose such a charge upon an opponent."[2]

But in some recent cases much prominence has been given, in the allowance or refusal of such expenses, to the question of notice to and distinct request from the covenantor,[3] and in

preparing for trial, attendance at court, and counsel fees since the commencement of the suit. The court, on the argument of exceptions to this report, held that the plaintiffs were entitled to recover in full the sums reported in the first and second classes of claims, except the sums paid to counsel; and that in the third class the counsel fees should be disallowed, and other charges placed "upon the same ground in that as in other actions, trespass for example;" and the fees of the auditor were allowed in the costs.

[1] Jeter *v.* Glenn, 9 Rich. L. (S. C.) 380; Gragg *v.* Richardson, 25 Ga. 566; Turner *v.* Miller, 42 Tex. 418; Williams *v.* Burg, 9 Lea, Tenn.) 455.

[2] Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166, which, however, was an action for a breach of warranty of quality of personal property, which had been resold by the plaintiff with a like covenant upon which his purchaser had recovered damages in an action of which the plaintiff had notified his vendor. See also Guild *v.* Guild, 2 Met. (Mass.) 233.

It must, however, be borne in mind, that whatever doubt may exist as to the propriety of including in the damages recoverable upon the *covenants for title* such counsel fees as have been referred to, none can exist in the case of a *covenant to indemnify* and save harmless the covenantee from all loss, damage, expenses, etc. Robinson *v.* Bakewell, 25 Pa. 426; Cox *v.* Henry, 32 id. 21; Anderson *v.* Washabaugh, 43 id. 115. Such covenants are often found in instruments accompanying the deed of conveyance (as in Robinson *v.* Bakewell), and at times in the executory articles of sale, in which latter case they are sometimes not merged or extinguished by the acceptance of the deed. Cox . Henry, *supra;* Colvin *v.* Schell, 1 Grant, (Pa. 226. In Gadsden *v.* The Bank of Georgetown, 5 Rich. L. (S. C.) 336, the plaintiff had an execution against a defendant, which the bank, a subsequent execution creditor, enjoined on giving a bond conditioned to save the plaintiff harmless from all damages which might arise by reason of the injunction, which was subsequently dissolved, and the plaintiff got his money. In a suit by him against the bank on this bond, it was held that he was not entitled to counsel fees, expenses, etc. incurred in the effort to dissolve the injunction.

[3] Yokum *v.* Thomas, 15 Io. 69; Crisfield *v.* Storr, 36 Md. 151. "It is the duty of the covenantor and those bound by the covenant," said Grason, J., who delivered the opinion in the latter case, "upon receiving notice, to defend the covenantee's title, and upon their refusal or neglect to do so it is clear that the latter would have the right to employ counsel for that purpose, and to recover, in an action on the covenant, such reasonable fees as they had been compelled to pay. But as the appellees did not give such notice, but voluntarily undertook to defend the title, they have no right to recover the counsel fees which they may have paid. Had notice been given to the appellants, they might have thought proper to defend the suit, and employ their own counsel, or they might have come to the conclusion that the title of the plaintiff in the ejectment could not be successfully resisted, and they might therefore have determined not to incur a useless expense in making a defence, and preferred to perform their covenant by paying to the appellees the amount of damages to which they might be entitled."

Pennsylvania, where notice to the covenantor had been given and not responded to, it was considered to be "most reasonable to hold that where a covenantor has been notified to appear and defend, and declines or fails to do so, and the covenantee chooses to proceed and incur costs and expenses in what it may be presumed the covenantor considered it to be an unnecessary and hopeless contest, he does so upon his own responsibility." [1]

A consideration of these rather conflicting cases would seem to suggest as a rule to be deduced from them that the plaintiff's right to recover counsel fees as part of his costs should, in general, be limited to cases where he has properly notified the party bound by the covenant to come in and defend the title, but that the neglect or silence of the latter should inure to the benefit of the plaintiff rather than to his own.

§ 201. It need scarcely be said that the suits hereinbefore referred to as those in which the expenses of costs and counsel fees are allowed to enter into the measure of damages, are strictly suits in which the title of the vendor, as covered by the covenants he has given, is necessarily called in question. No such expenses incurred in suits against wrong-doers can, of course, be recovered,[2] nor, it has been held, in any remote or other suits than that by which the paramount title was established.[3] Nor, on the other

[1] Terry *v.* Drabenstadt, 68 Pa. 403, per Sharswood, J. In that case, however, counsel fees were rejected, and the following language in Fulweiler *v.* Baugher, 15 S. & R. 55, was approved: "'If the vendee does not give notice, but appears and defends, it has not been allowed him to recover his counsel fees paid and his own expenses, for there may be no ground of defence, and he shall not subject his vendor, without his knowledge and against his will, to more than he is liable to on his covenant of warranty. This generally. There may possibly be exceptions when the warrantor has left the State, and expense must be incurred before he can be found and notice served, as in cases of fraud in the warrantor.' The reason of this decision applies with equal if not greater force where notice has been given and the warrantor has refused or declined to take defence. In the ancient warranty, when the warrantor was vouched to warranty, he must either appear and become tenant and take the defence of the title upon him, or judgment was given against him by default, and there was a recovery over in value. The substitution of the modern covenant for the ancient warranty ought not to change, and practically it has not changed, the rights and obligations of the respective parties. That an opposite doctrine might lead to serious wrong is illustrated in this very case, where it will be seen that the counsel fees and expenses make an addition of nearly fifty per cent to the amount of the damages." It will be perceived that the facts in this case were very similar to those in Rolph *v.* Crouch, L. R. 3 Exch. 44, *supra*, pp. 236, 267, n. 3; but the conclusion therefrom was different.

[2] Christy *v.* Ogle, 33 Ill. 295.

[3] Harding *v.* Larkin, 41 id. 421.

hand, must it be supposed that the right to recover counsel fees expended by the purchaser in the action by which he has sought to defend the title received from his vendor, can be so extended as to embrace those incurred in suing the latter upon his covenants for title.

CHAPTER X.

THE EXTENT TO WHICH COVENANTS FOR TITLE RUN WITH LAND, AND HEREIN OF THEIR RELEASE.

§ 202. It has been somewhat generally said on this side of the Atlantic, that covenants for title are divided into two classes: those which run with the land, and those which do not; that the former class includes the covenants for quiet enjoyment, of warranty, and for further assurance; and the latter, the covenants for seisin, for right to convey, and against incumbrances.[1]

§ 203. The common law doctrine of covenants running with land, being itself an exception to another common law rule, has been attended with many niceties of distinction which it would be needless here to dwell upon, and only so much of it as is applicable to the subject of covenants for title will here be noticed.

The doctrine which prohibited the assignment of choses in action applied of course to covenants, and was thus tersely stated in the preamble to the Statute 32 Hen. VIII. c. 24: "Forasmuch as by the common law of this realm no stranger to any covenant, action, or condition shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereto," etc.[2] In the earliest days of the law of

[1] This is not, however, the exact form in which the proposition should be stated, as all the covenants for title run with the land until breach, and the difference taken by American authority between them is, as will be hereafter shown, that the covenants for seisin, for right to convey, and, it would seem, against incumbrances, are broken as soon as made; while those for quiet enjoyment and of warranty are prospective, and no breach occurs till an eviction, actual or constructive.

[2] And in the next century, in his report of Lampet's Case, 10 Rep. 48, Coke said, in speaking of the questions resolved in it, "First was observed the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title, or thing in action shall be granted or assigned to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of due and equal execution of justice." Also Co. Litt. 266 *a*.

In Coke's day the reasons given for conclusions were not always the correct ones, and it is *said* to have "been adjudged in the Year Books that a chose in action cannot be transferred because livery of seisin cannot be given of it, as of land," nor of course possession, as in the case of a chattel; Tyler's Steph. Plead. 29; but the Year Book itself is not cited, nor can the case be found.

which we have accurate knowledge, warranty, which, like homage, was a natural incident of tenure,[1] passed with the transfer of the estate and inured to the benefit of the owner for the time being. When, later, deeds were introduced and the warranty was either express or was implied from the word of grant, *dedi*, neither the heir nor the assign of the grantee could take advantage of the warranty unless expressly named.[2] But while this was so as to warranty, it was not so as to certain covenants —

[1] *Supra*, § 2.

[2] Thus as to the express warranty, "If a man doth warrant land to another without this word [heirs] his heirs shall not vouch, and regularly if he warrant land to a man and his heirs, without naming assigns, his assignee shall not vouch." Co. Litt. 384 *b*. And as to the implied warranty, "If a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch." Spencer's case, 5 Rep. 16. For the reasons for this, we may refer to Judge Holmes's citation from Bracton and the contemporaneous and later authorities. Speaking of "the warranty which arose upon the transfer of property," he says, "We should call it a contract, but it probably presented itself to the minds of Glanvill's predecessors simply as a duty or obligation attached by law to a transaction which was directed to a different point, just as the liability of a bailee, which is now treated as arising from his undertaking, was originally raised by the law out of the position in which he stood toward third persons. . . . As I have said," adds the learned author, "Glanvill's predecessors probably regarded warranty as an obligation incident to a conveyance, rather than as a contract. But when it became usual to insert the undertaking to warrant in a deed or charter of feoffment, it lost something of its former isolation as a duty standing by itself, and admitted of being generalized. It was a promise by deed, and a promise by deed was a covenant. This was a covenant having peculiar circumstances attached to it, no doubt. It differed also in the scope of its obligations, as will be shown hereafter. But still it was a covenant, and could sometimes be sued on as such." Holmes, Common Law, 371, 377 *et seq.* And he then, with as much clearness as perhaps is possible as to a subject where much must be left to theoretical speculation, and as to which no author, dead or living, has been altogether clear, shows that Bracton's statement of the law was not "a piece of mediæval scholasticism," but fell in with the German and Anglo-Saxon law, and with the pervading thought of the Roman law. From soon after Bracton's time down to the present century these sources of the English common law were practically almost lost sight of.

What has been said as to the comparative lack of clearness of treatment of the subject of covenants running with the land will be amply justified by a study of the notes, English and American, to Spencer's case (Smith's Lead. Cas., 8th ed.), the Report of the English Real Property Commissioners in 1832, Sugd. on Vend. ch. xv. pl. 1, the notes in 9 Jarm. & Bythew. Conveyancing, 337, and the judgments in Bally *v.* Wells, 3 Wils. 29, Brewster *v.* Kitchell, Salk. 198, 1 Ld. Raym. 317, 12 Mod. 166, Roach *v.* Wadham, 6 East, 289, and Keppel *v.* Bailey, 2 Myl. & K. 517, to which may be added a score of others, and, in a word, almost everything bearing the name of authority, each seeming to differ from the other either as to results or the causes of them, and sometimes as to both. And the reason for it would seem to be that the original sources of the law, though partially known to those of Coke's time, were since largely ignored, and that which has been said as to the English law in general, viz. "To these causes we perhaps owe it that the most startling divergences of opinion on particular parts of the subject exist," (Mr. Scrutton's Preface to Influence of the Roman Law,) eminently applies to this part of it.

and chiefly among these were the covenants for title — the benefit of which passed with the land to the heir or the assign though not expressly named.[1] Just why or how this was so is nowhere stated in the old books with such precision as would preclude argument. In more modern times, amidst much difference of opinion, the doctrine has been variously supposed to depend upon privity of tenure, or privity of estate,[2] upon the nature of the

[1] Lougher *v.* Williams, 2 Lev. 92; Sacheverell *v.* Froggatt, 2 Saund. 367; Spencer's Case, *supra*. "But note," said Coke, "there is a diversity between a warranty that is a covenant real, which bindeth the parties to yield lands or tenements in recompense, and a covenant annexed to the land, which is to yield but damages, for that a covenant is in many cases extended further than the warranty." Co. Litt. 384 *b*.

[2] It is familiar that by the feudal law the transfer of every estate created privity of tenure between the parties, and hence both the burden and the benefit of all covenants made by either of them bound and profited the assignee of either; not of course by direct operation of assignment, but as incident to the land to which the covenant might be annexed.

But when the statute of *quia emptores* abolished subinfeudation, of course this privity no longer existed in cases where a fee was transferred and no reversion left in the donor; and it became a rule that covenants which imposed any charge, burden, or obligation upon the land were held not to be incident to it, and therefore incapable of passing with it to an assignee; thus, if the owner of land granted it *in fee*, reserving to himself a rent which the grantee covenanted to pay, here, though the covenant was to be performed out of the land, yet the assignee of the covenantor would hold the land discharged from its liability. Brewster *v.* Kitchell, *supra*. It was otherwise where there was a reversion left in the grantor. Thus at the end of the report in Pakenham's case, Year Book 42 Edw. III. 3, pl. 14, it was said by the reporter, "If I lease land to a man for term of life, and reserve thereout a certain rent, and I grant the reversion of the land to another, and the tenant attorn to the grantee, the grantee shall have the rent notwithstanding the covenant was not made to him." (See *infra*, p. 295, n. 1.) But where the conveyance is in fee, the liability of an assignee of the land to pay ground-rent can only be enforced, on strict principles, where there is some privity between the covenantee and the assignee of the covenantor. Milnes *v.* Branch, 5 Maule & Selw. 411; Randall *v.* Rigby, 4 Mees. & Welsb. 130. Before the statute of *quia emptores*, such a privity grew, at common law, out of every conveyance into which no contrary stipulation was introduced. In Pennsylvania, before it had been decided in Ingersoll *v.* Sergeant, 1 Whart. 337, that this statute never was in force in that State, the rights of the ground landlord against the assignee of his grantee could only have been supported upon the local common law of that State, though attempts had, before that decision, been made to found them on authority. Streaper *v.* Fisher, 1 Rawle, (Pa.) 155; Scott *v.* Lunt's Admrs., 7 Pet. (S. C. U. S.) 605. The decisions in New York of Van Rensselaer *v.* Hays, 19 N. Y. 68, Van Rensselaer *v.* Read, 26 id. 558, and Tyler *v.* Heidorn, 46 Barb. 439, were largely based upon the effect of the local statute of 1805, though the court evidently inclined to the opinion that the remedy existed at common law, and this view is presented with much earnestness in an article entitled "Is a Sub-lease for the Residue of a Lessee's Term in Effect an Assignment?" in 16 Am. Law Review, 16. It may be easy to cut the knot by saying, "The fiction of feudal tenure has nothing to do with the case," (per Denio, J., in Van Rensselaer *v.* Hays, *supra*,) and for practical purposes it is certainly convenient to conclude that "There is no reason why the sale of land on ground-rent, which

estate, upon the nature of the covenant,[1] and upon the relation

is often the most convenient form for both parties, should be hampered by restraints drawn from the feudal law." Judge Hare's note to Spencer's case, Smith's Lead. Cas. (8th ed.) 192. And the writer of the article dismisses the question by stating, "It appears, therefore, to be an exploded idea that privity of estate or tenure is necessary between the covenanting parties in order that covenants may run with the land."

As to privity of estate, that which was necessary to the running of the benefit of warranty is thus stated by Coke: "If a man at this day be enfeoffed, with warranty to him his heires and assignes, and he make a gift in taile, the remainder in fee, and the donee make a feoffment in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee but he that cometh in in privity of estate, but he must vouch his feoffor, and he (to) vouch as assignee." Co. Litt. 385 *a*. However this may have been as to warranty, it is at least doubtful whether any question as to privity of estate as between grantor and grantee should affect the capacity of the covenants for title contained in the deed for running with the land. Sugden says: "The proposition before stated, that it is not sufficient that a covenant is concerning the land but that in order to make it run with the land there must be a privity of estate between the parties, leads to the consideration of the question whether it applied as well to covenants entered into by a vendor, as to covenants entered into by a purchaser. If it does, the consequences of this doctrine are truly alarming. In a great proportion of cases, the vendor has either mortgaged the estate in fee, or is a mere *cestui que trust*;* and if his covenants were to be deemed covenants in gross, the assignees of the land could only compel performance of the covenants by the circuitous mode of using the name of the first purchaser or his representatives, whom at the distance of some years it might be very difficult to trace."

In order to settle such a question, the English Real Property Commissioners in their Third Report (p. 52), recommended legislation to provide "that in all cases the benefit of covenants entered into with the owner of land, and relating to the same land, shall run with the land for the benefit of every person taking the land, or any partial estate or interest in it, either under the covenantee, or under any act of the covenantee, or under any assurance by, through, or under which the covenantee may claim (notwithstanding any want of privity of estate with the covenantee, and whether the title of such person arises by way of transfer of seisin, or by way of use, or under the exercise of a power, or otherwise, and whether the covenantor had or had not any previous estate or interest in the land);" thereby assuming that such a question existed and was of practical importance, and it may have been Sugden's disagreement with their conclusions (which was frequent and pointedly expressed) which induced the statement in his later editions that the doctrine of privity of estate does *not* apply to covenants entered into by a vendor. Sugd. on Vend. (14th ed.) c. 15, § 1, pl. 14 *et seq.*

"And when," as has been said by a modern writer, "to this is added the weighty consideration of convenience (which would seem obviously to demand that covenants relating to land, *by whomsoever made*, should accompany the land), we may well entertain a doubt whether the courts would not now hold that covenants for title, to produce title-deeds, and all other covenants capable in their nature of running with the land, if made with any person having an estate in the land, would be annexed to that estate in the hands of an alienee." 9 Jarm. Byth. Conv. 357, 358.

[1] It is as to this that the greatest diversity of modern opinion has occurred. An authority entitled to great weight has said that if the covenant was one intended to benefit the land, it was considered to be incident to and to run with the land even

* This expression, that a vendor is generally "a mere *cestui que trust*," which might sound strangely to the American lawyer, has reference to the practice which, before the act of 3 & 4 Will. IV. c. 74, prevailed, of conveying estates "to dower uses." See *supra*, p. 22, n. 1.

of the covenant to the estate; and the difficulty of the questions

if made *by* a stranger, and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant. Judge Hare's note to Spencer's case, 1 Sm. L. Cases (8th Am. ed.) 176; and for this, Pakenham's case, Y. B. 42 Edw. III. 3, pl. 14, has been relied upon as an authority. The case is thus reported: —

"One Laurence Pakenham brought a Writ of Covenant as heir against a prior, and alleged by his Writ that (the prior) had not kept (the) covenant made between one J., his ancestor and grandfather whose heir the plaintiff is, and one his (the prior's) predecessor, in this that the prior and the convent should sing every week in a Chapel on his (J.'s) manor of K., for him and his servants, etc. Belknap (for the defendant): 'Neither the plaintiff nor his servants are dwelling within the manor, wherefore (I pray) judgment of the Writ.' Candish (for the plaintiff): 'This (is) to the action, wherefore if you wish that for your answer we wish to imparl.' Belknap: 'The Deed that you have offered provides that he (the prior) shall sing for him (the grantor) and his servants, and inasmuch as he and his servants are not dwelling within the manor you cannot maintain this Writ.' Candish: 'Then this is to the action, wherefore if you wish it for your answer we wish to imparl.' And then Belknap did not dare to demur, but said that the plaintiff has an elder brother, who is heir to his ancestor, to whom the action belongs, 'wherefore (I pray) judgment if you, since you are a younger son and not heir, can have an action.' Candish: 'The plaintiff is tenant of the manor where the singing should be done, in which case there is reason that the action should be maintained by him, wherefore we pray judgment and damages.' Belknap: 'And while you have brought your Writ, as heir, you have also an elder brother. (I pray) judgment if an action as heir, etc.'

"At another day. Candish said that 'J., great-grandfather [*sic*, it was grandfather *supra*] of the plaintiff enfeoffed one G. de M. of the manor, and the said G. enfeoffed the plaintiff and one Alice his wife of the manor to them and to the heirs of their two bodies begotten and in default of issue the remainder to J. and to his heirs; thus is the plaintiff tenant of the manor, and to no other belongs the right of action except to him, wherefore we pray judgment and our damages, and also we say, that since the feoffment the singing has been done from a time whereof the memory was not.' Belknap: 'And while you have brought this Writ as heir, it is not denied by you that there is a next heir to him who made the covenant, to whom the action belongs rather than to you; wherefore we pray that you be barred.' Candish: 'And we (pray) judgment since we are the tenants of the manor by purchase, and privy to the ancestor who made the covenant, and also the services have been done from a time whereof the memory is not; wherefore (we pray) judgment.' Belknap: 'How is it that he is privy of blood, and how is it that he has purchased the land of which while he has brought this Writ as heir, and he is not heir, and the action of covenant belongs to no one except to him who made the covenant or his heir? Wherefore we understand not that action, etc.' Finchden (J.): 'I have seen this in terms adjudged that two parceners made partition of their land, and one parcener made a covenant with the other to acquit her and her heirs of a suit that was due of the land, and the parcener aliened the land to a stranger and then the suit became in arrear and the stranger brought Writ of Covenant against the parcener to acquit him of suit, and the Writ was maintained notwithstanding that he was a stranger to the covenant, so here.' Belknap: 'I grant it in your case, because the acquittance fell upon the land, and not upon the person, and here the covenant is to the person.' Finchden: 'And if you grant me that this is law, then it is much stronger in the other case, for in the case that I have mentioned it was maintained because he (the plaintiff) was tenant of the land from which the suit was due, and so is he here, he is tenant of the manor

themselves is not less great than the practical importance of their results.[1]

where the chapel is, and in the chapel ought it to be done, wherefore, etc.' Wichingham (J.): 'If the King grant warren to another who is tenant of the manor, he shall have warren in the whole manor, and if he alien the manor yet the warren shall not pass by the grant, because it is not appendant to the manor, wherefore no more does it seem so here since the services are not appendant to the manor.' Thorpe (C. J.) to Belknap: 'There are some covenants on which no man shall have an action except the party to the covenant or his heir, and some [i. e. other] covenants have inheritance in the land so that whoever has the land by alienation, or in any other manner, shall have action on the covenant, and when you say that he is not heir, he is privy of blood and able to be heir, and also he is tenant of the land and it is a thing which is annexed to the chapel which is in the manor and so annexed to the manor, and so he has said that the services have been done from all times whereof there is memory, wherefore there is reason that this action should be maintained.' Belknap: 'He has nowhere in his count counted in such a prescription.' Thorpe: 'He did, and we bear record of it.' And the case was adjourned, etc., and it was said that if I lease land to a man for a term of life rendering certain rent and I grant the reversion of the land to another and the tenant attorns, that the grantee shall have the rent notwithstanding that he has no specialty, and (it) was not denied."

In this case it will be perceived that *as heir* of the original covenantee the plaintiff had no case, for he had an elder brother who was the heir, and the suggestion of Thorpe, C. J., that the plaintiff *might be* the heir is, as Sugden justly says of it (Sugd. on Vend. (14th ed.) 587, n.), "a bad argument." Apart from this, the plaintiff's counsel insisted that his right of recovery depended on his "being *tenant* (without stating the tenure) of the manor in which the singing should be performed," and this he pressed more than once, while the defendant's counsel distinguished the case of the parceners (for there "the acquittance lay upon the land and not upon the person, whilst here the covenant was personal"); and then Thorpe, C. J., said, in closing the discussion, "Some cove-

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[1] As to certain classes of covenants, viz. such as impose a burden upon the land, the importance can hardly perhaps be overstated (Keppell *v.* Bailey, 2 Myl. & K. 517, *supra*, p. 293, n. 2, may serve as an example); but as respects covenants for title, perhaps the only practical question which could arise would be whether such covenants made by a stranger would run with the land. It was suggested (among other places in Dickinson *v.* Hoomes, 8 Grat. (Va.) 406) that a purchaser who suspects an infirmity of title and doubts the responsibility of the vendor may fortify the title by covenants of the grantor's friends or other interested parties, and that these covenants would run with the land to future assignees. As to this, it has been said, "This notion is possibly correct, and if so highly important, but is not, we apprehend, in accordance with the common understanding among the members of the legal profession. 7 Jarman's Bythewood, 572 [it should be 9 Jarm. 357]. The introduction of such covenants into conveyances would be a novelty, and probably of doubtful expediency. At least it would not be prudent to rely on such covenants, until further adjudications have more fully determined their value. This question is of much importance with reference to covenants to *produce title deeds;* and there seem to be strong reasons why an exception should be made with respect to such covenants." 11 Am. Law Reg. 202.

But as will be seen, the questions both as to certain covenants which benefit the land and those to produce title papers have been sought to be solved in England by the recent Conveyancing and Law of Property Act, 1881, *infra*, § 210.

§ 204. But whatever may have been the grounds on which the doctrine was originally based, it has been from the earliest times

nants have an inheritance in the land, so that those which have the land by alienation *or in any other manner* shall have action on the covenant; . . . and also he (the plaintiff) here is the *tenant* of the land and it is a thing that is annexed to the chapel," etc. And here the case was adjourned.

The earliest commentator on this case was Coke, who in Spencer's case refers to it as deciding that "the tenants in tail *as terre-tenants* (for the elder brother was heir) should have an action of covenant against the prior, for the covenant is to do a thing which is annexed to the chapel, which is within the manor," etc.; and again in Co. Litt. 385, "In this case the assignees shall have an action of covenant, albeit they were not named, for that the remedy by covenant doth run with the land, to give damages to the party grieved, and was in a manner appurtenant to the manor;" and then, referring to Horne's case, 2 Hen. IV. 6, adds, "But if the covenant had been with a stranger (that is, one *not* seised or possessed of the manor) to celebrate divine service in the chapel of A. and his heirs, then the assignee (of the stranger) shall not have an action of covenant, for the covenant cannot be annexed to the manor because the covenantee was not seised of the manor." In other words, the covenant (to sing in the chapel) was a service to be performed in it, "a thing that is annexed to the chapel," or as is otherwise said, "in a manner appurtenant to the manor." This covenant had originally been made with the owner of the manor. At the time of action brought, this owner was dead, and the manor was in the possession, not of his heir, but of a younger brother of the latter, who was however "the tenant of the manor" by purchase, (that is to say, J., the original covenantor had enfeoffed G. de M. who had enfeoffed the plaintiff and his wife in tail, with remainder to J. and his heirs,) and it was held not necessary that the plaintiff should be the heir of J., but "whoever has the land by alienation *or in any other manner shall* have action on the covenant." So much for the case of the plaintiff, who was tenant of the land. But if the prior had covenanted, not with the owner of the land, but with some third party, "a stranger," then the assignee of the latter could not sue, "for the covenantee was not seised of the manor," and this was Horne's case.

One instinctively here recalls the recent remarks of Judge Hare as to the origin of another matter of disputed doctrine (part of the law of assumpsit): "Such is an outline of the result, and of the steps by which it was attained; but they cannot be traced with the accuracy and precision which the importance of the subject requires. The Year Books give a vivid picture of the daily course of events in court, but want method and completeness, and are not so much reports in the sense in which we now understand the term, as notes from which reports might be compiled. The proceeding opens with an oral declaration of the cause and nature of the action; an earnest discussion follows, in which the arguments of counsel and the *dicta* from the bench are so curiously interwoven as not to be easily distinguishable. There is, perchance, a plea or demurrer; and the debate not infrequently ends in an adjournment without our learning the result, or whether the case ever went to judgment. Moreover, the judges did not in pronouncing judgment give the formal explanation of their reasons which became usual at a later period, and the grounds of the decision must consequently be gathered from the views expressed during the argument." Hare on Contracts, 137.

For the purposes of this treatise it is not necessary to follow the discussion of Pakenham's case and of Coke's commentaries upon it down to the present day. On the one hand it has been considered by high authority that the case and the decisions which have followed it establish the rule that if the covenant were one intended to benefit the land (such as to sing in a chapel), it must be considered as incident to and to run with the land even if made by a stranger (not *to* a stranger),

consistently held both with regard to the ancient warranty and the modern covenants for title that they run with the land to its

and therefore whoever might become the owner of the land would also become entitled to the benefit of the covenant, although if the covenant were one which imposed a burden on the land, it would not run with it. (Notes by the editor of Spencer's case, 1 Lead. Cas. 176, and cases there cited.) On the other hand it has been thought that such a distinction is of modern growth and had no origin in old authority.

But it is familiar that the Roman law admitted no exception to the rule that a stranger to a contract shall not have the benefit of it, and equally familiar that it has long been held in England that where a covenantee has no interest in the performance of the covenant, whose entire benefit will inure to a third person, the latter may sue. It may, therefore, be suggested that the doctrine that when the covenant is for the benefit of the land it shall run with the land, was one of the earliest instances of the application in the English law of this principle. Pakenham's case would seem to bear out the idea, because the occupant of the land was the only person who could gain if the covenant were fulfilled, or be the loser if it were broken.

In the chapter on Successions Inter Vivos in Holmes's Common Law, a treatise not more interesting for what it tells us than for what it suggests, he considers that the subject now under discussion has become confused by not observing the difference originally taken by the law between rights inhering in the land — such as easements, and the old warranty, which, if necessary, could be enforced even by a disseisor — and rights of contract, depending upon succession or privity. Pakenham's case, he considers, shows the judges hesitating between these two conceptions. "If they are understood, I think the explanation will be clear;" and then, after stating the case, says, "The Chief Justice, after suggesting the possibility of sufficient privity on the ground that the plaintiff was privy in blood and might be heir (which was very weak) turns to the other argument as more promising, and evidently founds his opinion upon it. It would almost seem that he considered a prescriptive right enough to support the action, and it is pretty clear that he thought that a disseisor would have had the same rights as the plaintiff." Com. Law, 398. And then — after noticing Horne's case, Y. B. 2 Hen. IV. 6, pl. 25, in which Markham, one of the judges, said, "In a writ of covenant one must be privy to the covenant if he would have a writ of covenant or aid by the covenant; but, peradventure, if the covenant had been made with the lord of the manor, who had inheritance in the manor, *ou issint come determination poit estre fait*, it would be otherwise," which was admitted — he goes on to say, "The distinction taken by Markham is stated very clearly in a case reported by Lord Coke. In the argument of Chudleigh's case the line is drawn thus: 'Always, the warranty as to voucher requires privity of estate to which it was annexed,' (i. e. succession to the original covenantee,) 'and the same law of a use. . . . But of things annexed to land it is otherwise, as of commons, advowsons, and the like appendants or appurtenances. . . . So a disseisor, abator, intruder, or the lord by escheat, etc. shall have them as things annexed to the land. So note a diversity between a use or warranty, and the like things annexed to the estate of the land in privity, and commons, advowsons, and other hereditaments annexed to the possession of the land.' And this, it seems to me, is the nearest approach which has ever been made to the truth." Com. Law, 399.

In the recent case in the Supreme Court of Massachusetts, of Norcross *v.* James, 140 Mass. 188, in which the opinion was delivered by the learned author in question, the distinction is again noticed: —

"The discussion of the question under what circumstances a land-owner is entitled to rights created by way of covenant with a former owner of the land has been much confused since the time of Lord Coke, by neglecting a distinction, which he stated with perfect clearness, between those rights which run only with the es-

owner for the time being; that is to say, the owner of the land is considered entitled to the benefit of all the warranties and cove-

tate in the land, and those which are said to be attached to the land itself. 'So note a diversity between a use or warranty,'" etc., *ut supra*, p. 294, n. 1.

"Rights of the class represented by the ancient warranty and now by the usual covenants for title, are pure matters of contract, and from a very early date down to comparatively modern times lawyers have been perplexed with the question, how an assignee could sue upon a contract to which he was not a party [citing authorities]. . . . But an heir could sue upon a warranty of his ancestor, because for that purpose he was *eadem persona cum antecessore*. . . . And the conception was gradually extended in a qualified way to assigns where they were mentioned in the deed. . . . But in order that an assignee should be so far identified in law with the original covenantee, he must have the same estate, that is, the same *status* or inheritance, and thus be the same *persona quoad* the contract. But, as will be seen, the privity of estate which is thus required is privity of the estate with the original covenantee, not with the original covenantor; and this is the only privity of which there is anything said in the ancient books. . . . Of course we are not now speaking of cases of landlord and tenant, and it will be seen that the doctrine has no necessary connection with tenure. . . . We may add, that the burden of an ordinary warranty in fee did not fall upon assigns, although it might upon an heir as representing the person of his ancestor. . . .

"On the other hand, if the rights in question were of the class to which commons belonged, and of which easements are the most conspicuous type, these rights, whether created by prescription, grant, or covenant, when once acquired were attached to the land, and went with it, irrespective of privity, into all hands, even those of a disseisor. 'So a disseisor, abator, intruder, or the lord by escheat, etc. shall have them as things annexed to the land.' . . . In like manner, when, as was usual although not invariable, the duty was regarded as falling upon land, the burden of the covenant or grant went with the servient land into all hands, and of course there was no need to mention assigns. . . . The phrase consecrated to cases where privity was not necessary was *transit terra cum onere*. . . . And it was said that 'a covenant which runs and rests with the land lies for or against the assignee at common law, *quia transit terra cum onere*, although the assignee be not named in the covenant.' . . .

"It is not necessary to consider whether possession of the land alone would have been sufficient to maintain the action of covenant: it is enough for our present purposes that it carried the right of property. Neither is it necessary to consider the difficulties that have sometimes arisen in distinguishing rights of this latter class from pure matters of contract, by reason of their having embraced active duties as well as those purely passive and negative ones which are plainly interests carved out of a servient estate and matters of grant. The most conspicuous example is Pakenham's case, Y. B. 42 Ed. III. 3, pl. 14, where the plaintiff recovered in covenant as terre-tenant, although not heir, upon a covenant or prescriptive duty to sing in the chapel of his manor. . . .

"When it is said, in this class of cases, that there must be a privity of estate between the covenantor and the covenantee, it only means that the covenant must impose such a burden on the land of the covenantor as to be in substance, or to carry with it, a grant of an easement or *quasi* easement, or must be in aid of such a grant, which is generally true, although, as has been shown, not invariably, and although not quite reconcilable with all the old cases except by somewhat hypothetical historical explanation. But the expression 'privity of estate,' in this sense, is of modern use, and has been carried over from the cases of warranty, where it was used with a wholly different meaning.

"In the main, the line between the two classes of cases distinguished by Lord Coke is sufficiently clear."

Coke's statement and view of Paken-

nants which the prior owners in the chain of title may have given. There was, however, this important difference between warranty and the covenants which superseded it. The former was, in the strict sense of the word, a covenant real, and its benefit descended upon the heir in every instance, whether it had or had not been broken in the lifetime of the ancestor. It was a right to which an executor could never succeed.[1] But with respect to covenants, although until breach they equally with the warranty passed to the heir with the land they were intended to protect, yet if a breach had occurred in the lifetime of the testator, they then became *choses in action*, incapable of transmission or descent, and whose right survived to the executor alone.[2]

Nor is there any difference, as to principle, between English and American authority in this respect. It is a settled rule on both sides of the Atlantic that *until breach* the covenants for title, without distinction between them, run with the land to heirs and assigns.

§ 205. But while this is well settled, a strong current of American authority has set in favor of the position that the covenants for seisin, for right to convey, and perhaps against incumbrances, are what are called covenants *in præsenti* — if broken at all, their breach occurs at the moment of their creation. The covenant is, that a particular state of things exists *at that time*, and if this be not true, the delivery of the deed which contains such a covenant causes an instant breach; these covenants

ham's case is not wholly free from obscurity. Sugden considers that the case "stands alone, but the ground upon which it depends has never been explained," and it has been said that his strictures upon it "have resulted in its complete overthrow as authority." 11 Amer. Law Reg. 193, 257. The author of this article further considers that "the portions particularly relied on were not judicial resolutions, but an addition by the reporter," but as to this it may be said that the only note by the reporter was that heretofore cited (p. 295, n. 1) as to a covenant to pay rent inuring to the assignee of the reversion.

[1] Fitz. Nat. Brev. 145; Touchstone, 175; Holmes, Common Law, 372.

[2] Com. Dig. Covenant, B. 1; Wentworth's Office of Exec. 160; Lucy *v.* Levington, 2 Levinz, 26; Morley *v.* Polhill, 2 Vent. 56; Smith *v.* Simonds, Comb. 64; Raymond *v.* Fitch, 2 Cromp., Mees. & Rosc. 588; s. c. 5 Tyr. 985; Ricketts *v.* Weaver, 12 Mees. & Welsb. 718; Young *v.* Raincock, 7 Com. Bench, 310. The much controverted cases of Kingdon *v.* Nottle, 1 Maule & Selw. 355, 4 id. 53, and of King *v.* Jones, 5 Taunt. 418, Jones *v.* King, 4 Maule & Selw. 188, contain some *dicta* which would seem to justify the conclusion that modern covenants for title, like the warranty, passed to the heir or devisee, whether the breach did or did not happen in the testator's lifetime. This was going too far, and has since been corrected by the cases of Raymond *v.* Fitch, Ricketts *v.* Weaver, and Young *v.* Raincock, *supra*.

are then, it is held, turned into a mere right of action, which is not assignable at law, which can be taken advantage of only by the covenantee or his personal representatives, and can neither pass to an heir, a devisee, nor a subsequent purchaser.

Hence a distinction, therefore, is considered by this class of cases to exist between the covenants just named and those for quiet enjoyment, of warranty, and for further assurance, which are held to be prospective in their character.

The leading case as to this is Greenby *v.* Wilcocks,[1] decided by the Supreme Court of New York, in 1806. The defendant had conveyed certain land, with covenants for seisin, of good right to convey, and of warranty, to one under whom the plaintiff claimed under mesne conveyances, and the latter, being evicted by title paramount,[2] brought covenant. For the defendant, it was objected that the declaration having averred that there was a total defect of title when the defendant executed the deed, the covenants were then broken and could not be assigned over by the first grantee, and this objection was held by the majority of the court to be conclusive.[3] The doctrine so laid down has been repeatedly recog-

[1] 2 Johns. (N. Y.) 1.

[2] The declaration in this case was, as to the covenant of warranty, clearly defective in not alleging that the eviction was under lawful title (see *supra*, § 155), though it was not (as seemed to be considered in the opinion) necessary to aver that it was had under legal process (see *supra*, § 132).

[3] "*Choses in action*," said Spencer, J., who delivered the opinion, "are incapable of assignment at the common law; and what can distinguish these covenants, broken the instant they were made, from an ordinary *chose in action?* The covenants, it is true, are such as run with the land, but here the substratum fails, for there was no land whereof the defendant was seised, and of consequence none that he could alien; the covenants are therefore naked ones, uncoupled with a right to the soil."

Apart from the cases of Lucy *v.* Levington, 2 Lev. 26, and Lewes *v.* Ridge, Cro. Eliz. 863, (referred to *infra*, p. 304, and which do not support the position claimed for them,) the only authority cited for the defendant was the following passage in the Touchstone, p. 170: "If one be seised of land in fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate he doth covenant that he is lawfully seised or possessed, or that he hath a good estate, or that he is able to make such an alienation, etc., and in truth he hath not, but some other hath an estate in it before — in this case the covenant is broken as soon as it is made. And if I bargain and sell land, by deed indented, to B., and before the deed is inrolled I grant the same land to C. and covenant that I am seised of a good estate of it in fee, and after the deed is inrolled — in this case the covenant is broken." In the margin of the first edition of the Touchstone, opposite the first sentence, are quoted Dyer, 303, and 9 Rep. 60. The case in Dyer is Northcote *v.* Ward, which was simply that the defendant Ward had granted the farm of the ulnage of salable cloths in certain counties to the plaintiff Northcote, with a covenant that he was lawfully possessed of the same by letters patent from the crown. The plaintiff, "supposing the covenant broken in this, because the patent was void by reason of the want of

nized and affirmed, and the weight of American authority is unquestionably in favor of the position that the covenant for seisin being broken, if at all, at the instant of its creation, is thereby turned into a mere right of action, incapable of assignment, and consequently of being used by any but the covenantee or his personal representatives.[1]

the treasurer's warrant by the statutes thereof made, which are chiefly touched upon hereafter, brought a writ of covenant and upon the writ and count the defendant demurred." And it appearing to the court that the king might not, under the statutes in that behalf, grant the office of aulnager without a warrant from the treasurer, judgment was, without argument, given for the plaintiff, and that the said letters patent were void. The case in 9 Coke is Bradshaw's case (sometimes cited as Salmon *v.* Bradshaw, and reported less fully in Cro. Jac. 304, and partially in Hobart, 114, and Doct., pl. 61), in which Bradshaw, having demised certain lands to the plaintiff for six years if one Reyns should so long live, covenanting that he had full power so to demise them, the plaintiff declared that the defendant had not such power to demise, and so had broken his covenant. The defendant pleaded accord and satisfaction, on which judgment was entered for the plaintiff, and the case was then removed to *Cam. Scac.*, where it was assigned for error, first, "that the plaintiff had not averred that Reyns was alive at the time of the beginning of the said lease, nor at the time of the action brought; *et non allocatur*, for the covenant refers to the time of the lease made, and then, be Reyns alive or dead, the action lies; for if he be dead before the lease, then the lease is absolute, and if he died after the lease, and before the action brought, yet the action lies, and consideration shall be had thereof in damages." The other error assigned (and this is the principal one noted in the report in Cro. Jac.) was that the plaintiff had not shown what other person had title to the premises at the time of the making of the indenture, but the court held that the breach was sufficiently assigned by negativing the words of the covenant (see as to this *supra*, § 61). These cases therefore do not support the position claimed for them in the Touchstone.

Opposite the second sentence in the Touchstone is cited in the margin, in the first and all the subsequent editions, "Adjudged Sir Perall Brocas' case, 32 Q," but the case is unreported. There is, indeed, a case of that name reported in 2 Leonard, 211, and 3 id. 219, but it is upon another subject. It was suggested, after some research, that "32 Q" referred to the decision being made in the 32d year of Queen Elizabeth's reign, and the writer examined the record of those cases, now preserved in the new Record Office in Chancery Lane. The decisions of 32 Elizabeth form a roll of about four thousand membranes of parchment, written, of course, in Norman French, in court hand, much abbreviated, and with ink which has faded as to part, and time did not permit the examination of all of them. Later investigations, and by eminent legal bibliographers, have been unavailing to find the report. In the absence of the case itself, we may perhaps rest with the belief that Brocas' case was cited as supporting the second sentence quoted in the Touchstone, that is, that the covenant of seisin contained in the second deed was broken by the enrolment of the prior conveyance, as to which see *supra*, p. 169, n. 5.

[1] Logan *v.* Moulder, 1 Pike, (Ark.) 313; Ross *v.* Turner, 2 Eng. (Ark.) 132; Pate *v.* Mitchell, 23 Ark. 590; Hendricks *v.* Keesee, 32 id. 714; Lawrence *v.* Montgomery, 37 Cal. 188; Salmon *v.* Vallejo, 41 id. 481; Mitchell *v.* Warner, 5 Conn. 497; Davis *v.* Lyman, 6 id. 249; Hartford Co. *v.* Miller, 41 id. 112; Brady *v.* Spurck, 27 Ill. 482; Jones *v.* Warner, 81 id. 343; Dale *v.* Shively, 8 Kans. 276; Scoffins *v.* Grandstaff, 12 id. 467; South *v.* Hoy, 3 Mon. (Ky.) 94; Rice *v.* Spottswood, 6 id. 40; Pence *v.* Duvall, 9 B. Mon. (Ky.) 48; Hacker *v.* Storer, 8 Greenl. (Me.)

An examination of this class of cases will show that the decision is often given with reluctance, and only in obedience to what is supposed to be the strict technical common law rule, as illustrated and enforced by the cases of Lucy *v.* Levington[1] and Lewes *v.* Ridge.[2] It is remarkable that these cases do not support the posi-

228 ; Heath *v.* Whidden, 24 Me. 383 (but see the recent statute in Maine, cited *infra*); Bickford *v.* Page, 2 Mass. 455 ; Prescott *v.* Trueman, 4 id. 627; Wheelock *v.* Thayer, 16 Pick. (Mass.) 68 ; Thayer *v.* Clemence, 22 id. 490 ; Clark *v.* Swift, 3 Met. (Mass.) 390 ; Kimball *v.* Bryant, 25 Minn. 496 ; Lowry *v.* Tilleny, 31 id. 500 ; Smith *v.* Jefts, 44 N. H. 482 ; Lot *v.* Thomas, 1 Penn. (N. J.) 297 ; Chapman *v.* Holmes, 5 Halst. (N. J.) 20 ; Garrison *v.* Sanford, 7 id. 261 ; Carter *v.* Denman, 3 Zab. (N. J.) 260 ; Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1 ; Hamilton *v.* Wilson, 4 id. 72 ; Townsend *v.* Morris, 6 Cow. (N. Y.) 123 ; Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120 ; McCarty *v.* Leggett, 3 Hill, (N. Y.) 134 ; Blydenburgh *v.* Cotheal, 1 Duer, (N. Y.) 197 ; Coit *v.* McReynolds, 2 Rob. (N. Y.) 655 (this was a case of great hardship) ; Chapman *v.* Kimball, 7 Neb. 399 ; Davidson *v.* Cox, 10 id. 150 ; Wilson *v.* Forbes, 2 Dev. (N. C.) 30 ; Grist *v.* Hodges, 3 id. 200 ; Kenny *v.* Norton, 10 Heisk. (Tenn.) 384 ; Westrope *v.* Chambers, 51 Tex. 178; Williams *v.* Wetherbee, 1 Aik. (Verm.) 233 ; Garfield *v.* Williams, 2 Verm. 327 ; Pierce *v.* Johnson, 4 id. 253 ; Richardson *v.* Dorr, 5 id. 9 ; Potter *v.* Taylor, 6 id. 676 ; Pillsbury *v.* Mitchell, 5 Wis. 21.

[1] This case is reported in 2 Levinz, 26 ; 1 Ventris, 175 ; 2 Keble, 831. The report in Levinz is, as to the point now under inquiry, the most full, and is as follows : "Covenant : and declares that Levington sold to Luke Lucy, the plaintiff's testator, certain lands, and covenanted with him, his heirs and assigns, that he should enjoy the same against him and Sir Peter Vanlore, their heirs and assigns, and all claiming under them ; and assigns for breach, that Croke, claiming under Vanlore, ejected him. The defendant pleaded that at the time of the covenant he was seised of an indefeasible title, and that by a subsequent act of Parliament, reciting that Sir Peter Vanlore had settled his estate upon the Lady Mary Powell, and that certain persons had unduly procured her to levy a fine, it was enacted that this fine should be void, and that all persons might enter as if no fine had been levied ; and that by force of this fine, *non aliter*, the defendant was seised, and sold and made this covenant ; and that after the act, Croke, claiming by title derived from the Lady Mary Powell by the settlement of Vanlore, by virtue of the said act of Parliament entered and ousted him ; upon which the plaintiff demurred ; and for the defendant it was argued, first, that the covenant was with Lucy, his heirs and assigns, touching an estate of inheritance ; therefore the action ought to be brought by the heir or assignee, whose loss it is, and not by the executors. To which it was answered and resolved by the court *that the eviction being to the testator*, he cannot have an heir or assignee of this land ; and so the damages belong to the executors, though not named in the covenant, for they represent the person of the testator." The rest of the report is not material.

[2] Cro. Eliz. 863. This case is the authority deemed in this country to be conclusive that a covenant for seisin or against incumbrances is broken as soon as made. The decision seems to have been somewhat misunderstood. "The case was such : the defendant, being seised of land in fee, let it for life, remainder for life, rendering rent, and afterwards acknowledged a statute, and after that by indenture bargained and sold the reversion, and covenanted with the bargainee, his heirs and assigns, that it should be discharged within two years of all statutes, charges, and incumbrances excepting the estates for life. The statute is extended, and thereupon this reversion and rent was extended. The bargainee grants this reversion to the plaintiff, who, for not discharging of this statute, brings covenant. And all this

tion for which their authority is relied upon. The case of Lucy *v.* Levington decided no more than that where a testator who had received a covenant for quiet enjoyment *had been evicted*, his ex-

matter being disclosed to the court, it was thereupon demurred. The question principally moved was, whether the plaintiff, as assignee, shall have benefit of this covenant made to the bargainee by the common law, or by the statute of 32 Hen. VIII. But because the covenant was broken before the plaintiff's purchase, the land being then in extent, and so a thing in action, which could not be transferred over, it was adjudged for the defendant that the action was not maintainable against him."

There are two obvious points of view from which the authority of this case will be found in no degree opposed to principle, or to that of the more recent English decisions. In the first place, there can be no doubt that a covenant *to discharge* of incumbrances within two years, being a covenant to do a thing certain at or within a certain time, is finally and actually broken at the expiration of that time, although no special damage whatever may have occurred to the covenantee. This was expressly decided in Lethbridge *v.* Mytton, 2 Barn. & Adolph. 772, *supra*, § 74, and this has been recognized and applied in many cases on this side of the Atlantic (see these cited *supra*, p. 89, n. 2). "There is a difference," said Swift, J., in the course of an able opinion in the case of Booth *v.* Starr, 1 Conn. 249, "between a contract to discharge or acquit from a debt, and one to discharge or acquit from the damages by reason of it. Where the condition of the contract is to discharge or acquit the plaintiff from a bond or other particular thing, then, unless this be done, the defendant is liable from the nature of the contract, though the plaintiff has not paid. But if it be to discharge and acquit the plaintiff from any damage by reason of such bond or particular thing, then it is a condition to indemnify and save harmless. 1 Sand. 117, n." Under the ordinary covenant against incumbrances, as we have heretofore seen, although it may be held to be broken as soon as made, yet no more than nominal damages can as a general rule be recovered by reason of such a mere technical breach. *Supra*, § 188.

But besides this, it seems to have been overlooked that execution had issued upon the statute; the land was actually extended; the covenant was therefore as completely broken as it could be, "the land being then in extent, *and so* [that is, the covenant] a *chose in action;*" and if we substitute the assignment by the covenantee in the one case for the death of the covenantee in the other, the case of Lewes *v.* Ridge is the same as that of Lucy *v.* Levington; each consistent with the other and each deciding no more or less than that *after total breach* the covenant becomes a *chose in action*, and therefore incapable of transmission or descent.

In Lewes *v.* Ridge, the word *extent* seems to have been used in its general sense, as synonymous with execution upon a statute or recognizance. This was often the case in the older books, for although, upon a statute staple the conusee could not, after the appraisement or extent of the lands, immediately take possession of them, but was obliged to sue out a *liberate* (Fitz. Nat. Brev. 132), in which case the extent was not the consummation of the execution but only one of its parts, yet upon a statute merchant, if the sheriff returned to the *capias* that the party was dead or not in his bailiwick, the lands were extended and forthwith delivered to the conusee, without the delay or expense of a *liberate*. Fitz. Nat. Brev. 130. (Instances of the word *extent* being thus used will be found in Bac. Ab. Execution, B, and see the Stat. de Merc. 13 Edw. I. stat. 3, c. 1.) This construction seems also to have been put upon the case of Lewes *v.* Ridge in the somewhat recent case of Tillotson *v.* Boyd, 4 Sandf. (N. Y.) 521, where it is said, "As long ago as the time of Queen Elizabeth, it was held that a purchaser of land could not sue the person who had conveyed to his immediate grantor, on a covenant which was *broken before* the plaintiff had acquired right. Lewes *v.* Ridge, Cro. Eliz. 863."

ecutor was the proper party to take advantage of the covenant, the whole and ultimate damage having accrued to the testator by the eviction in his lifetime; in other words, after the covenant is broken, its capacity for running with the land of course ceases; and this was also the point decided in Lewes *v.* Ridge; a proposition too obvious to need the support of authority, and which applied equally to a covenant for seisin or for quiet enjoyment.[1]

§ 206. In England it was held early in the present century that no such distinction existed between the different covenants for title. That for seisin, it was considered, was not like a covenant to perform a single act, which not being performed, the covenant is broken once for all, but it was rather in the nature of a covenant to do a thing *toties quoties* as the exigencies of the case may require, and the want of seisin was therefore a continuing breach; and even although, according to the letter, there should be a breach on the instant of the creation of the covenant (when its words are in the present tense), yet according to its spirit, the right of action should pass to and vest in the party in whose time the substantial breach occurred and who ultimately sustained damage; the covenant not being intended merely for the benefit of the covenantee, but for the protection of all who derive their title to the land through him.[2]

[1] Shelton *v.* Codman, 3 Cush. (Mass.) 321; Field *v.* Snell, 4 id. 509; Tillotson *v.* Boyd, 4 Sandf. S. C. (N. Y.) 521.

[2] 1 Maule & Selw. 355 (A. D. 1813). Thus in Kingdon *v.* Nottle, when first presented, the plaintiff *as executrix* sued the defendant for a breach of the covenant for seisin, and as is usual in declaring on this covenant, assigned for breach that the defendant was not seised, etc., which on special demurrer was held bad, on the ground that there was no other damage than such as arose from a breach of the defendant's covenant that he had a good title, that that breach was not shown to have been a damage to the testator, that it was not alleged that the estate was thereby prejudiced during the lifetime of the testator, and if after his decease any damage occurred that would be a matter which concerned the heir, and judgment was therefore entered for the defendant. But when the case was again presented, (Kingdon *v.* Nottle, 4 Maule & Selw. 53,) the same plaintiff sued *as devisee* of the covenantee, setting forth in the declaration that the estate had been prejudiced by reason of the defect of title and its sale prevented. On demurrer, it was argued for the defendant that the covenant was broken as soon as made, and therefore no right of action passed to the devisee; but it was held that so long as the defendant had not a good title there was a continuing breach, and that although according to the letter there was a breach in the testator's lifetime, yet according to the spirit the substantial breach was in the time of the devisee, for she thereby lost the fruit of the covenant in not being able to dispose of the estate.

The case of King *v.* Jones (5 Taunton, 418) proceeded much on the same ground, though the covenant was for further assurance, which, although its breach occurs technically by the refusal to execute a further assurance, (see *infra*, § 230,) may present the same question as that arising

§ 207. As will presently be seen, the doctrine of a "continuing breach" (which was simply a technicality invented to get over

on the covenant for seisin. In that case, the refusal to make further assurance occurred during the lifetime of the covenantee, while the real damage was felt by his heir, who was the party evicted. "The covenantee," it was said by the court, "paid his purchase money, relying on the vendor's covenant; he required him to perform it, but gave him time, and did not sue him instantaneously for his neglect, but waited for the event. It was wise so to do, until the ultimate damage was sustained, for otherwise he could not have recovered the whole value; the ultimate damage, then, not having been sustained in the time of the ancestor, the action remained to the heir (who represents the ancestor in respect of land, as the executor does in respect of personalty) in preference to the executor," and this judgment was affirmed on writ of error to the King's Bench.

Kingdon *v.* Nottle, and King *v.* Jones, were lately followed by the High Court of Justice for Ontario in Platt *v.* Grand Trunk Ry. Co., 11 Ontario, 246.

In considering these cases, care must be taken to distinguish between their actual decisions and the *dicta* which they contain. The cases themselves decide no more than that in the first place, *until breach*, the covenants for title run with the land, and that secondly the breach of the covenant for seisin, though nominally occurring at the instant of its creation, is in reality *a continuing breach*, not consummated until some actual damage has taken place. In other words, it is not so much a covenant *in præsenti* as a covenant of indemnity. The American authorities agree with the first of these propositions, but in general dissent from the second. Chancellor Kent, in referring to the doctrine of the American cases, has remarked: "It is to be regretted that the technical scruple that a *chose in action* was not assignable does necessarily prevent the assignee from availing himself of any or all of the covenants; he is the most interested, and the most fit person to claim the indemnity secured by them, for the compensation belongs to him, as the last purchaser and the first sufferer;" 4 Kent's Comm. 472; but he considers that the doctrine that the want of seisin was a continuing breach "is too refined to be sound. The breach is single, entire, and perfect in the first instance." Nominally, indeed, this is so, yet in many instances it may be that the breach is but nominal, for a long time undiscovered perhaps, and in point of fact injuring no one, and the want of title may be at length for the first time felt by one who, removed from the original grantee by many conveyances, has directly to bear the whole burden of the loss. In such case, if the injured party has not received a general covenant from his immediate grantor, and the covenants for seisin or against incumbrances are the only ones in the deed, he may be, according to the current of American decision, without remedy; for a covenant limited to the acts of the grantor would not, of course, be broken by any want of seisin in those prior to himself in the chain of title. In those parts of this country where, as in England, a vendor does not in general covenant beyond his own acts, it becomes important that each vendee should have the benefit of all the covenants entered into by the prior owners, so that although each vendor may only have covenanted against his own acts, yet in the last vendee will be vested the right to take advantage of each and all of these covenants; and this can only be on the principle that their technical and their actual breach occur at the same time.

The doctrine of the English cases was nowhere more severely assailed than in Mitchell *v.* Warner, 5 Conn. 497, the language of Hosmer, C. J., in which case was quoted in the fourth edition of this treatise. It has been remarked in a recent essay: "It must be admitted that Lord Ellenborough's idea of a continuing breach is open to objection, and we conceive that the unsatisfactory nature of this reason has sometimes occasioned the rejection of the rule which it was designed to support." 11 Am. Law Reg. 273.

the other technicality of the chose in action being insusceptible of assignment) has been strongly dissented from in America, and has certainly not been approved in England in a very recent case in the Exchequer, for in an action brought upon the covenant (among others) of good right to convey, it was held that the statute of limitations began to run from the date of the deed, the breach being "completed, if it ever existed, at the time the deed was executed," although the actual damage did not occur till more than twenty years after.[1]

§ 208. Whatever may be the technical grounds on which the earlier English decisions rest, it may be observed that in deciding such questions upon covenants for title regard should be had to the purpose of their introduction, and the object which they were intended to fulfil. They succeeded the common law warranty, which was exclusively a covenant real, and could never be taken advantage of by a personal representative; and the introduction of covenants in place of warranty was intended rather to extend the remedy (both by means of the more pliable action of covenant and by giving indemnity in the shape of damages[2]) than to alter materially the rights of those entitled to their benefit. It was probably not supposed, at the period of its introduction, that the covenant for seisin could never be used by one to whom the land had come by assignment or inheritance, and

[1] Spoor *v.* Green, L. R. 9 Exch. 99. In 1844, the plaintiff was party to a twenty-one years' lease of coal mines, which gave powers over the surface incidental to their working, and soon after, the coal was substantially worked out. The next year, the defendant conveyed the land, covenanting for title, for quiet enjoyment, and against incumbrances, and the year after, this grantee conveyed to the plaintiff. In 1848, subsequent to the conveyance to the plaintiff and within twenty years before action, the lessees entered the mines and took away a little coal, etc. not included in the demise, and in 1865 a subsidence occurred. So far as the pleadings were concerned there was a variance, it being untruly alleged that the removal of the coal which caused the subsidence occurred while the plaintiff was seised, and this the court refused leave to amend. And as to the rest, the court (Kelly, C. B., dissenting) considered that the breach, if any, of the covenant for title occurred in the time of the first grantee, and was barred by the lapse of twenty years, and further, that neither the acts of trespass in 1848 in taking coal, etc. not included in the demise, nor the subsidence caused in 1865 by the workings in 1845, were breaches of the covenant for quiet enjoyment, on the ground that the first was merely a trespass (see *supra*, § 127), and that as to the second, there having been no disturbance in the plaintiff's time, the subsidence gave no new cause of action. Judgment was therefore entered for the defendant. In his dissenting opinion, the Chief Baron still approved of the decision in Kingdon *v.* Nottle, etc. and considered that judgment should be entered for the plaintiff for nominal damages.

[2] *Supra*, Ch. I. § 12 *et seq.*

that its benefit was restrained to the covenantee himself, or to his executor, if the actual damage had happened in his lifetime. Such a doctrine, if practically enforced, would have materially lessened its value.[1]

§ 209. The doctrine of the earlier English cases, if objection be made to them, may perhaps be doubted in so far as they seem utterly to deny to a covenantee or his personal representative any right of action unless special damage in his time be averred and proved. And while to allow a covenantee to recover at his option the consideration money when no special damage has occurred leads to embarrassments which have already been considered,[2] yet these difficulties, themselves capable of modification, yield in importance to the more serious results which flow from holding the covenant to be broken at once and forever at the time of its creation, for in many cases its short life does good to no one.

§ 210. Recent though limited legislation upon the subject has been had in England. In the "Conveyancing and Law of Property Act, 1881," [3] which has largely changed the practice of conveyancing by the introduction of short forms and of implied covenants for the title, it is provided that "the benefit of a covenant implied as aforesaid [4] shall be annexed and incident to and

[1] Nor, as has been already said, can an authority be found in the English books to support such a doctrine. The old cases, when examined, not only fail to sustain it, but Brocas' case, *supra*, p. 302, n. 3, if correctly reported, impliedly decides the contrary. It may be noticed that in 3 Wentworth's Pleading, 440, will be found an elaborate declaration (drawn by Mr. Lawes, the author of Pleadings in Assumpsit) in an action brought by the assignee of one who had received covenants that a lease was a valid and subsisting one, and that the covenantor had full power to assign it.

[2] In an essay already referred to, the author says: "I would suggest whether the following view, though new and probably not entirely unobjectionable, is not more satisfactory. The non-existence of the facts covenanted for may of itself become a serious injury to the estate (as by preventing its sale), and ought, without anything more, to be a good foundation for an action on the covenants, if the covenantee choose so to regard it. But if the covenantee remains ignorant of the defect until the land is assigned, or if, knowing it, he elects not to treat it as a breach of the covenants (perhaps expecting that the defect will be removed before causing any positive injury), and under these circumstances assigns the land, it is reasonable to consider the assignee as fully invested with all right in the covenants, as the covenantor was before assignment. Stated more briefly, our view is, that a technical breach may become a substantial one by being treated as such." 11 Am. Law Reg. 273. But this suggestion is scarcely as new as the learned author seems to suppose. See Sugd. on Vend. (14th ed.) 611; Dart on Vend. 716.

[3] 44 & 45 Vict., c. 41, L. R. xvii. Stat. 110. See this statute referred to *infra*, Ch. XIII.

[4] The covenants thus implied are those of good right to convey, quiet enjoyment,

shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested." [1]

§ 211. On this side of the Atlantic, it will be found that the doctrine of the American cases is not standing the test of practical experience, and that while the rule of the earlier English cases is fully recognized in some of the United States and partially in others, there are again those in which the legislature has effected remedy, either by direct legislation upon the subject itself or by such comprehensive provisions in codes of procedure as produce the same effect; and from the tendency of modern decision and legislation it is possible that at no distant day that which we have called the American doctrine will practically be largely modified.

Thus in Maine, which took the lead in direct legislation on the subject, the Revised Statutes nearly fifty years ago expressly gave to the assignee of a covenantee a right of action for a breach of the covenant of seisin and against incumbrances,[2] and in the latest revision this has been substantially re-enacted.[3]

freedom from incumbrances, and further assurance. It will be observed that this provision does not go to the length of some of the American statutes presently to be referred to, which declare that the covenants for seisin, &c. shall inure to the assignee, but only that such statutory covenants as are implied shall so inure.

[1] L. R. xvii. Stat. 119, § 7, (E) (6). There are also provisions as to heirs being bound by covenant, although not named, etc. *Infra*, Ch. XIII.

[2] Rev. St. 1841, title 10, c. 115, § 16. The provisions of this enactment, which seem not to have been perfectly clear, and the decisions explaining it, will be found in the fourth edition of this treatise, p. 328, note. It was said that the object of the statute was to give an assignee a right of action on the personal covenants, which before he did not have. It left the common law in force as to covenants real which run with the land. Wilson *v.* Widenham, 51 Me. 566.

[3] "The assignee of a grantee, or his executor or administrator, after eviction by an older and better title, may maintain an action on a covenant of seisin or freedom from incumbrance contained in absolute deeds of the premises between the parties, and recover such damages as the first grantee might have recovered on eviction, upon filing, at the first term, in court, for the use of his grantor, a release of the covenants of his deed and of all causes of action thereon. The prior grantee cannot, in such case, release the covenants of the first grantor to the prejudice of his grantee." Rev. St. 1883, p. 697, title 9, § 18. No doubt the decision in Wilson *v.* Widenham, *supra*, that the provision in the prior act as to filing a release did not apply to one suing upon a coveuant of warranty, would be held equally to apply under this statute. In Littlefield *v.* Pinkham, 72 Me. 369, the court, again referring to the question of release, said: "As at common law a breach of the covenant of seisin of one not seised is broken when made, the right of action thereon does not pass to the assignee of the covenantor's grantee; and

So in Colorado, it is provided that covenants for seisin, peaceable possession, freedom from incumbrances, and of warranty, shall be held to run with the premises and to inure to the benefit of all subsequent purchasers and incumbrancers.[1]

So in Georgia, it is provided that "the purchaser of land obtains with the title, however conveyed to him, at public or private sale, all the rights which any former owner of the land under whom he claims may have had by virtue of any covenants of warranty of title, or of quiet enjoyment, or of freedom from incumbrances, contained in the conveyance from any former grantor, unless the transmission of such covenants with the land is expressly negatived in the covenant itself."[2]

hence the assignee cannot maintain an action thereon in his own name at common law. But to 'avoid circuity of action' (Trask *v.* Wilder, 50 Maine, 453), the legislature changed the common law conditionally, by providing in substance that the assignee of the covenantor's grantee might, upon eviction, maintain such action in his own name, 'upon filing at the first term in court for the use of his grantor a release of the covenants of his deed and of all causes of action thereon.' R. S. c. 82, § 15. The release in such case is not for the benefit of the defendant, but for the 'use of the defendant's grantee.'"

[1] Rev. St. 1883, p. 172.

[2] Rev. St. 1882, p. 672.

The provisions in the code of California are rather peculiar. It is declared (Hittell's Codes & Stats. of Cal., 1876, p. 743):—

"§ 6460. Certain covenants, contained in grants of estates in real property, are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

"§ 6461. The only covenants which run with the land are those specified in this title, and those which are incidental thereto.

"§ 6462. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land.

"§ 6463. The last section includes covenants 'of warranty,' 'for quiet enjoyment,' or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee.

"§ 6464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns, or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned.

"§ 6465. A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property.

"§ 6466. No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it or ceased to enjoy its benefits.

"§ 6467. Where several persons, holding by several titles, are subject to the burden or entitled to the benefit of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively, if such value can be ascertained, and if not, then according to

The same result has been practically reached by general provisions in new codes of procedure in New York, Ohio, Minnesota, and doubtless other States, which establish the rule that every action must be prosecuted in the name of the real party in interest,[1] and this is held to include the covenants for title, and a purchaser, as being the real party in interest, is therefore entitled to sue upon a covenant for seisin given to any predecessor in the chain of title.[2] In Ohio, however, decision had, for many years and to a great extent, preceded legislation,[3] and

their respective interests in point of quantity."

The code in Dakota is taken from that of California, and is in effect the same. 2 Levisee's Revised Code (1883), p. 917, §§ 819–826.

It will be observed that the only covenants herein named are those of warranty, quiet enjoyment, further assurance, and for payment of rent and taxes, while a large margin is left for such covenants as are "made for the direct benefit of the property, or some part of it then in existence, . . . or not then in existence." It may perhaps be doubted whether this statute is not more declaratory than remedial.

[1] New York Code of Procedure, 1876, § 449, re-enacting a former similar provision; Rev. Stats. Ohio, 1884, p. 1034, § 4993; Kimball *v.* Bryant, 25 Minn. 496. In this case the court, after referring to the American doctrine, said: "While we must concede this to be not only the general American doctrine, but the one most in accord with the intention of the parties as expressed by the terms of covenant, it by no means follows that the covenantee's grantee can have no advantage from the covenant. Most of the American courts which hold that the covenant does not inure to the benefit of the grantee proceed upon the ground that by the breach it becomes a mere chose in action, and is not assignable — a reason which has no force in this State, where choses in action in the nature of property may be assigned. It is assumed that the conveyance by the covenantee would be sufficient to pass the chose in action if it were assignable, and we think this is so. The covenant is taken for the protection and assurance of the title which the grantor assumes to pass by his deed to the covenantee; and where the covenantee assumes to pass that title to another, it is fair to suppose that he intends to pass with it, for the protection of his grantee, every assurance of it that he has, whether resting in right of action or in unbroken covenant; so that if, before enforcing his remedy for breach of the covenant, the covenantee execute a conveyance of the land, unless there be something to show a contrary intention it may be presumed that he intends to confer on his grantee the benefit of the covenant so far as necessary for his protection — that is, that he intends to pass all his right to sue for the breach, so far as the grantee sustains injury by reason of it."

[2] Colby *v.* Osgood, 29 Barb. (N. Y.) 339; Roberts *v.* Levy, 3 Abb. Pract. (N. S.) 311; Ernst *v.* Parsons, 54 How. Prac. 163; Hall *v.* Plaine, 14 Ohio, 417.

[3] The Supreme Court of Ohio, though professing not to go quite to the extent of the modern English cases, yet before the passage of the new code did not in reality stop far short of them. Backus *v.* M'Coy, 3 Ohio, 216, is the leading case, and although the pleadings did not perhaps strictly call for the doctrine there laid down, yet it was adhered to, and became the law of that State. Sherman, J., in delivering the opinion of the court, after referring to the English decisions just cited, considered that they settled that "when the heir or assignee acquires any interest in the land, however small, by even an imperfect or defective title, he shall be entitled to the benefit of all those covenants that concern the realty; and where he has been evicted by paramount

the course of decision in that State has been somewhat consistently followed in Missouri.[1]

title, he is the party damnified by the nonperformance of the grantor's covenants, and for such breach may sustain an action. This seems to be reasonable in itself, as well as in accordance with the terms of the covenant. By considering the covenant of seisin as a real covenant, attendant upon the inheritance, it will form a part of every grantee's security, and make that which otherwise must be a dead letter or a means of injustice a most useful and beneficial covenant; a dead letter, when an intermediate conveyance has taken place between the making of the covenant and the discovery of the defect of title, and the covenantee refuses to bring suit; a means of injustice, when, after the covenantee has sold and conveyed without covenants, he brings and sustains an action that the covenant was broken the moment it was entered into, and could not thereafter be assigned. When lands are granted in fee by such a conveyance as will pass a fee, and the grantor covenants that he is seised in fee, we can perceive no objection, legal or equitable, to this covenant, as well as the covenant of warranty, passing with the land, so long as the purchaser and the successive grantees under him remain in the undisturbed possession and enjoyment of the land." (See *supra*, p. 55, n. 3.) The doctrine thus held, though strenuously assailed in the argument of a subsequent case (Foote *v.* Burnett, 10 Ohio, 327), was nevertheless there adopted by the court, and was considered to be the settled law in the State of Ohio, even before the adoption of the Code of Civil Procedure. Devore . Sunderland, 17 Ohio, 60; Stites *v.* Hobbs, 2 Disn. (Ohio) 573.

[1] Dickson *v.* Desire, 23 Mo. 162; Magwire *v.* Riggin, 44 id. 512; Walker *v.* Deaver, 5 Mo. App. 147; White *v.* Stevens, 13 id. 240; Hall *v.* Scott Co., 2 McCrary, (C. C. U. S.) 356. In the first of these cases, the court, after referring to the English authorities, said: "It is thus seen that the real point of difference is, that in England the covenant of seisin is under some circumstances a mere covenant of indemnity; but in some of the United States it is always a present covenant, which, if ever broken, must be broken as soon as made, and upon which of course only one recovery can be had, the right to which accrues as soon as the covenant is entered into. The true question would then seem to be, at what time the right of substantial recovery accrues, whether at the moment of the delivery of the deed, or is it postponed under any circumstances until the actual damage is sustained. It would seem quite impossible to hold, as we were asked to do in a case before us at the present term, that the cause of action accrues immediately, so as to set the statute of limitations in motion against the party, if we are to hold that during the whole period of its running the party could not have recovered anything more than nominal damages; and it would seem quite unreasonable to say that the party could not have a real recovery upon the mere formal breach, because no actual damage has resulted to him from the want of title, and yet afterwards to allow him to recover, not on account of any damage that had accrued to himself, but in respect to the loss that had fallen upon his grantee." After referring to the Ohio decisions, it was then said: "We are disposed to take a similar view of our statute covenant. It proceeded no doubt from an instinctive feeling of the moral propriety of requiring a party who sells land, and not merely his own interest in it, whatever that may be, and conveys it by words of transfer appropriate to such a transaction, to secure to the purchaser and those who succeed him in his rights, the enjoyment of the property sold, and to indemnify them if it should be lost by reason of any defect of title. This construction we think will best promote the object the legislature had in view, and subserve the purposes of justice in transactions of this kind; and we may remark here historically that the State of Maine, in the recent revision of her laws, has expressly provided that the right of action upon a covenant of seisin shall vest in the assignee of the land, so

In Indiana, the leading authority is Martin *v.* Baker,[1] which went to the full length of the earlier English cases. In an action of covenant brought by the administrator of a grantee upon the covenants for seisin and against incumbrances, it was held first, that an executor could sue upon those covenants only when special damage had accrued in the lifetime of his testator; and secondly, that if such damage had accrued since his death or conveyance of the land, his heir, devisee, or grantee could sue; and the authority of Kingdon *v.* Nottle was distinctly recognized and affirmed, and that of Greenby *v.* Wilcocks as distinctly denied. The subsequent cases in that State will, on examination, be found to have consistently followed this decision down to the present day.[2]

as to enable him to sue and recover in his own right, after an eviction by a title paramount. When, therefore, a defeasible title, or the possession without any title, has passed under the deed, we shall consider the statute obligation in respect to the title rather as one of indemnity, which, running with the land until the damage is sustained, enures to the benefit of the party on whom the loss falls. The general doctrine of the old law as to the real warranty, that when no estate passes to which the warranty can be annexed, the benefit of it does not run to a subsequent assignee, admitting it to be applicable to the modern covenants of title, is obviated, in cases like the present, by the American decisions that the conveyance by a grantor in possession under a claim of title passes an estate to the grantee sufficient to carry the covenants to any subsequent assignee." As to this see *infra*, § 233. In the subsequent case of Chambers *v.* Smith, 23 Mo. 179, it was said, "If there be a total defect of title, defeasible and indefeasible, and the possession have not gone along with the deed, the covenant is broken as soon as it is entered into, and cannot pass to an assignee upon any subsequent transfer of the supposed right of the original grantee. In such case the breach is final and complete; the covenant is broken immediately, once for all, and the party recovers all the damages that can ever result from it. If, however, the possession pass, although without right, — if an estate in fact although not in law, be transferred by the deed, and the grantee have the enjoyment of the property according to the terms of the sale, the covenant runs with the land and passes from party to party until the paramount title results in some damage to the actual possessor, and then the right of action upon the covenant vests in the party upon whom the loss falls," and such was also the decision in Bethell *v.* Bethell, 54 Ind. 428. Under the local practice in Missouri, it seems that there should be an express assignment of the right of action. Van Doren *v.* Relfe, 20 Mo. 455.

[1] 5 Blackf. (Ind.) 232.

[2] In Reasoner *v.* Edmundson, 5 Ind. 393, it was held that a mortgage executed by a grantor before his subsequent conveyance in fee was not a breach of the covenant for seisin (the mortgagee not having entered), though it was technically a breach of the covenant against incumbrances. Bottorf *v.* Smith, 7 Ind. 673, was an action on a promissory note given for the consideration of the sale of real estate. The defence was that the covenant for seisin was broken, and the court said, "The deed contained a covenant for seisin; and if the vendor had no title to the premises, that covenant was broken immediately after it was executed, and the defendants may allege such breach as a failure of consideration." This, however, it was held, he had not done, and the case itself is one of that numerous class which decide that mere failure of title will not of itself in general be a sufficient defence to an action for its purchase

In Wisconsin, the Supreme Court at one time followed the American cases,[1] but has more recently held: "After the fullest consideration of the question and examination of the authorities, we are satisfied that the decisions of the English courts, and of the courts of this country in which they have been followed, furnish the only sound and just rule for the interpretation of the covenant for seisin. We therefore, without hesitation, adopt it."[2]

money. See *infra*, Ch. XIV. The remark that "the covenant was broken as soon as made" does not touch the point ruled in Martin *v.* Baker. In Overhiser *v.* McCollister, 10 Ind. 42, which was an action by a grantee against his grantor (and after his death against his executor), the court said: "If there has been a technical breach only, and the covenantee has lost nothing, he can recover only nominal damages. This rule is recognized in Martin *v.* Baker, and is obviously just."

But Martin *v.* Baker went further than this, and held, at least, that the representatives of a deceased covenantee could recover *nothing*, unless special damage were averred. The distinction between a judgment for the defendant and a judgment for the plaintiff for nominal damages may appear slight, but it leads to practical consequences of importance (see *supra*, § 189). In Frink *v.* Bellis, 33 Ind. 135, Frink had conveyed, with a covenant of warranty (and, apparently, against incumbrances), to Johnson, who had conveyed to Hamlin, who had conveyed to Bellis. At the time of the first conveyance the premises were subject to a mortgage which, while Bellis was the owner of the land, was foreclosed, and one of the plaintiffs, to prevent a sale, paid off the mortgage, but it did not appear whether this was done during the lifetime or after the death of Bellis. The plaintiffs, who were her heirs, brought covenant, and the court held, on the authority of Martin *v.* Baker, and of a quotation from this treatise, that the special damage having been to Bellis, her administrator must, and her heirs could not, sue. It will be observed that the court must have considered the covenant against incumbrances to be a continuing one, as they allowed it to run with the land from Johnson to Hamlin and from Hamlin to Bellis, and when the actual damage happened, in her time, it then stopped. In Martin *v.* Baker, the heir recovered because the actual damage happened to *him;* in Frink *v.* Bellis, the heir was not allowed to recover, because the actual damage happened to his ancestor.

In Coleman *v.* Lyman, 42 Ind. 289, it was considered that "the case of Martin *v.* Baker has stood and been recognized as the law of this State for more than thirty years." S. P. Wilson *v.* Peele, 78 id. 384; Wright *v.* Nipple, 92 id. 310. The case of Bethell *v.* Bethell, 54 id. 428, must not be misunderstood. There the defendant, a citizen of Indiana, had conveyed to the plaintiff, a citizen of the same State, by deed containing the words "grant, bargain, sell, and convey," but with no express covenants, a tract of land in Missouri of which he had never been in possession and to which he had no title. The court held that if there was an implied covenant for seisin, it was, according to Chambers *v.* Smith, 23 Mo. 174, broken as soon as made, because the defendant had no title in law or in fact, and being therefore personal, the suit was governed by the *lex loci contractus*. But as under the *lex loci contractus* no such covenant would be implied, the plaintiff had no cause of action.

Where, however, the actual breach occurs by the loss of possession in the lifetime of the covenantee, it is obviously held that the action must be by the administrator of the latter, and not by the heirs. Wilson *v.* Peele, *supra*. And so where the grantor is not in possession, and does not put his grantee in possession, the covenant is deemed to be broken at once. M'Clure *v.* M'Clure, 85 Ind. 482.

[1] Pillsbury *v.* Mitchell, 5 Wis. 17.

[2] Mecklem *v.* Blake, 22 Wis. 495 (1868).

The latest decisions there have adhered to this doctrine;[1] and in Iowa also it has been approved.[2]

§ 212. But the doctrine of the American cases was not applied to the covenant against incumbrances without a struggle, and in some States it does not prevail at all. The original purpose of the introduction of this covenant — it being often connected with that for quiet enjoyment and thereby rendered equally prospective with it,[3] being generally treated as a covenant of indemnity — and the obvious policy of its benefit inuring to the owner for the time being have worked against the rule which has confined the covenant for seisin within such a narrow sphere of usefulness. Accordingly, we find that in South Carolina it has been held that the benefit of this covenant passes with the land to its assignee,[4] while in some earlier cases in Massachusetts,[5] the assignee of one who had received a covenant against incumbrances was, without objection or comment, allowed to recover, and in a subsequent case the language of the court in favor of the rights of the assignee was direct and explicit.[6] But a few years after,[7] the technical rule was adhered to in so few words as to induce the

[1] In the much litigated case of Eaton *v.* Lyman, 24 Wis. 438, 26 id. 61, 28 id. 324, 30 id. 41, 33 id. 34, such was the final result of decision. The dissenting opinion of Dixon, C. J., in 30 Wis. 41, elaborately discusses the question, and his view was finally sustained in 33 Wis. 34. It will be seen that the question is necessarily involved with that of the measure of damages. If the covenant is one *in præsenti*, and the damages merely nominal because no actual damage has been suffered, the value of the covenant is practically much lessened.

[2] Schofield *v.* Iowa Homestead Co. 32 Io. 317; Knadler *v.* Sharp, 36 id. 232; Boon *v.* McHenry, 7 N. W. Rep. 503.

[3] See *supra*, § 70.

[4] McCrady *v.* Brisbane, 1 Nott & McCord, (S. C.) 104. The authorities, however, cited in support of this were not applicable to this covenant, since they were cases arising under covenants for further assurance, eminently prospective in their operation, and indeed the distinction between their several natures seems not to have been very closely observed. Quoting the case from the Year Book heretofore noticed (*supra*, p. 295 n.) — "It hath been adjudged (42 Edw. III.) that where two coparceners made partition of land, and the one made a covenant with the other to acquit her and her heirs of a suit that issued out of the land, the covenantee aliened; in that case the assignee shall have an action of covenant, and yet he was a stranger to the covenant, because the acquittal did run with the land,") — Cheves, J., said, "This seems almost precisely the case before us, and authorizes me to say that where the covenant runs with the land, the assignee of the fee may have the benefit of the covenant against incumbrances in a case like the present." This is of course obvious, provided it be not held that the covenant is broken once and for all at the instant of its creation. In the quotation from the Year Book, the covenant was a prospective one, and the decision would it is believed have been the same at the present day in any court. See *infra*, p. 318, n. 1.

[5] Stinson *v.* Sumner, 9 Mass. 143, and Estabrook *v.* Hapgood, 10 id. 313.

[6] Sprague *v.* Baker, 17 Mass. 588.

[7] Tufts *v.* Adams, 8 Pick. (Mass.) 549.

impression that it had never been doubted, and although in one case the question seems to have been thought an open one,[1] yet when the point was directly presented within a few years past, the authority of the cases which had proceeded upon the doctrine of the earlier English decisions was repudiated.[2] In a late case in Vermont, it was, however, distinctly held that "the covenant against incumbrances runs with the land, and can be enforced for the benefit of the party holding the legal title;"[3] and somewhat recently in Illinois, the court, feeling unfettered by local precedents and free to adopt the rule which it regarded the more reasonable and just, sustained, against an original covenantor, a suit by a remote grantee for actual damages resulting to him from the breach of a covenant against incumbrances.[4] In a recent case in Michigan, the subject was carefully considered by Judge Cooley, and a distinction suggested between such an incumbrance as an easement, which immediately affects the title

[1] Pettee *v.* Hawes, 13 Pick. (Mass.) 327.

[2] Thayer *v.* Clemence, 22 Pick. (Mass.) 494; Clark *v.* Swift, 3 Met. (Mass.) 394; Whitney *v.* Dinsmore, 6 Cush. (Mass.) 128; Osborne *v.* Atkins, 6 Gray, (Mass.) 424.

[3] Cole *v.* Kimball, 52 Verm. 639.

[4] Richard *v.* Bent, 59 Ill. 38. "Where the covenant of seisin is broken," said Sheldon, J. "and there is an entire failure of title, the breach is final and complete, the covenant is broken once for all; actual damage, and all the damage that can result from the breach, have accrued; the measure of damages is the purchase money and interest, which are at once recoverable. In such case, the right of action is substantial, and its transfer may well be held to come within the rule prohibiting the assignment of choses in action. But as the covenant against incumbrances is one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the incumbrance. And where there is the barren right of recovery of only nominal damages, the right of action is one only in name and is essentially no right of action. It is distinguishable from an ordinary chose in action. The [plaintiff] does not claim to make his title to sue by means of the purchase of a chose in action. The subject of his purchase was a lot of ground; the covenant is claimed to be annexed to the real estate; that it ran with the land and passed to him, not by direct operation of assignment but as an incident to the land. The right of suit for nominal damages, which [the plaintiff's grantor] had against the [defendant], was no matter of consideration between the parties at the time of the purchase, but it was regarded that in case the purchaser of the land should sustain any actual damage by reason of a prior incumbrance, the covenant would then be to him a means of indemnity. It would seem to be a case not coming within the reason of the rule prohibiting the assignment of choses in action, as the court were inclined to think in Sprague *v.* Baker [*supra*]. What is the temptation to buy up mere nominal rights of action, or the danger therefrom, 'lest there should be multiplying contentions and suits'?" The doctrine of the American cases was nevertheless followed by the Federal court in that State in the later case of Fuller *v.* Jillette, 9 Biss. (C. C. U. S.) 296.

and causes present damage, and one which is a money charge, which must attach itself to the title for the protection of the covenantee and his assigns.[1]

The question, however, may be considered as at least temporarily settled in favor of the technical rule in Massachusetts and most of the other States, with the exception, as has been said, of Maine, Colorado, Georgia, New York, Ohio, Minnesota, Missouri, Indiana, Wisconsin, Iowa, South Carolina, Vermont, and possibly Michigan, unless when the covenant against incumbrances is so linked to another covenant as to have a prospective operation and not be a covenant *in præsenti*.[2]

§ 213. Of course no difference of opinion can exist as to the right of an assignee to take advantage of the covenants for quiet enjoyment and of warranty, which are, with entire unanimity on both sides of the Atlantic, held to run with the land for the protection of the owner in whose time the breach occurs, and until then, passing with the estate by descent or by purchase, by voluntary or by involuntary alienation,[3] and may therefore of course

[1] "A covenant," said the learned judge, "may be said to run with the land when the purpose is to give future protection to the title which the deed containing the covenant undertook to convey, and it does not run with the land when its whole force is spent in giving assurance against something which immediately affects the title and causes present damage. Tested by this rule, a covenant against an incumbrance which consists in a right of way would not run with the land, but a covenant against a money charge must attach itself to the title conveyed, and accompany it, not only for the protection of the covenantee, but for the protection of any of his assigns whom the incumbrance may eventually damnify. . . . It is only by thus distinguishing between incumbrances that the covenant can have reasonable effect in all cases, and when the courts thus discriminate there is no difficulty in giving substantial redress under definite and inflexible rules of law. When the law can be just and also certain, there is no reason why an unjust certainty should be perpetuated. . . . So far, I have expressed my own views and have not spoken for any one else. My brethren think that the broad question I have discussed is not involved. They are of opinion that the covenant is special, and that it looks to the future, and promises indemnity for damages that may at any time in the future result from the breach. In this view it is immaterial whether the ordinary covenant against incumbrances would or would not be broken finally, if at all, at the delivery of the deed containing it."

[2] As where the covenant is that the purchaser "shall enjoy, etc., *and that* free of all incumbrances," etc. See Jeter *v.* Glenn, 9 Rich. L. (S. C.) 376; Andrews *v.* Appel, 22 Hun, (N. Y.) 429; and *supra*, § 70.

[3] Thus it has been repeatedly held that the benefit of covenants for title will pass to a purchaser at sheriff's sale of a debtor's estate. Redwine *v.* Brown, 10 Ga. 320; White *v.* Whitney, 3 Met. (Mass.) 81 (see this case noticed *infra*, p. 326, n. 2); White *v.* Presly, 54 Miss. 313; Carter *v.* Denman, 3 Zab. (N. J.) 270; Town *v.* Needham, 3 Paige, (N. Y.) 546; McCrady *v.* Brisbane, 1 N. & McC. (S. C.) 104; Lewis *v.* Cook, 13 Ired. L. (N. C.) 196; Markland *v.* Crump, 1 Dev. & Batt. (N. C.) 94. In Georgia, the Re-

be enforced not only by the covenantee and his representatives, but by heirs, devisees, and alienees, who claim under the seisin vested in him.[1]

Thus in England, it is the theory of conveyancers to vest in every purchaser the benefit of all the prior covenants which have been entered into by the former vendors, and this though each vendor may only have covenanted against his own acts. Accordingly, if A., B., C., and D. were successively vendors and purchasers of an estate, each covenanting only against his own acts, C. would, on the conveyance to him, acquire the same rights under A.'s covenant to B. as B. had himself done, and by a conveyance to D. the latter would acquire all the benefit of the prior covenants of A. to B., in addition to those which he had personally received from C. It is evident, however, that if the defect of title were caused by A., D. would have no remedy upon the covenants of B. or C.; so if the defect were caused by C., he could sue neither A. nor B. If the covenants were general, that is, not limited to the acts of the party covenanting, it would be otherwise; as for a defect caused by A., D. could sue either A., B., or C.; but it is apprehended that if the defect were the consequence of C.'s acts, neither A. nor B. could be held liable, as it would be unreasonable that a man should be held responsible for the acts of future owners of the estate.

§ 214. Of course, a covenantee may sue simultaneously each and all of his previous successive covenantors, and recover several

vised Code expressly provides that "the purchaser at judicial sales may enforce any covenants of warranty running with the land which may be incorporated in the previous title deeds;" Rev. Co. 1882, § 2623; but it would seem from the foregoing decisions that this hardly needed legislative enactment.

[1] "For instance, if A. convey land to B. and his heirs, to certain specified uses, or to such uses as C. shall appoint, and covenant for title with B. and his heirs, the right to sue upon the covenants will go with the seisin to the persons from time to time claiming under the uses limited by the conveyance, or under any appointment by C. under his power; so if the conveyance were to B. and his heirs, to such uses as C. shall appoint, and, in default of appointment, to the use of C. in fee, and A. covenant with C. and his heirs, and C. (instead of exercising his power of appointment) convey the estate limited to him in default of appointment, his alienee, it appears, can sue upon A.'s covenants; so, if C., in the exercise of his power, appoint the land to the use of D., and covenant with him and his heirs for title, C.'s covenants can be sued upon by the alienees of D.; and in the two former cases the right to sue upon A.'s covenants, and in the last case the right to sue upon C.'s covenants, will go with the land to all successive owners; and the heir or assignee, although not named in the covenants for title, may nevertheless sue thereupon." Dart on Vend. (5th ed.) 778; and see Sugd. on Vend. (14th ed.) 573.

judgments against each of them[1] (just as the last holder of a negotiable instrument may recover against all those liable thereon), although of course he can have but one satisfaction, and the payment by any covenantor of a judgment thus recovered against him may be pleaded in bar of any action brought against him by a subsequent covenantor who has himself paid a judgment also recovered against him, and of larger amount.[2] It is equally true that covenants for title are capable of being divided as to the benefit to be derived from them.[3]

[1] King *v.* Kerr, 5 Ohio, 155 ; Foote *v.* Burnet, 10 id. 317.

[2] Thus in Wilson *v.* Taylor, 9 Ohio St. 595, Taylor conveyed land to Wilson, who conveyed to Legget, who conveyed to Weis, all with covenants of general warranty. The last, being evicted of part of the land, recovered judgment against Legget for $414.43, against Wilson for $284.43, and against Taylor for $280.23. Taylor paid the judgment of $280.23, and Wilson also paid the judgment of $284.43, and then sued Taylor, who pleaded the recovery and payment in bar, and the plea was held good. "Weis, the last covenantee, and who suffered damage by reason of partial eviction," said the court, "was entitled to his several action against all the prior covenantors. Not only was his right of action perfect against all, but the same rule of damages would apply as to all ; and although he could have but one satisfaction, yet he was clearly entitled to recover the full amount of his damages against each. If he failed to make the proper showing in order to recover the full amount of his damages against each, it was his own fault ; and having collected and received the amount recovered against the first covenantor, who occupied the position, in law, of a guarantor of all the subsequent grantees, it seems to us that Weis's claim under all the covenants must be held satisfied ; and that all enforcement of the judgments against the other intermediate covenantors was wrongful, and in violation of the principle that he could have but one satisfaction. Taylor ought not to be subjected to different actions, and liable to several recoveries for the same breach of the same covenant. It follows from this that the plaintiff has mistaken his remedy. He ought, after the satisfaction by Taylor of the judgment against him, to have either resorted to a court of equity to restrain the collection of the judgment against himself, or, if circumstances forbade that, to have sued to recover back the money he had paid on the judgment against him, as for money had and received by Weis wrongfully, and which in conscience he ought not to retain."

[3] Mr. Preston was of the opposite opinion. According to him (3 Prest. on Abst. of Title, 57), if a vendor sold two farms and covenanted with their purchaser and his heirs and assigns, and one of these farms were sold to a third person, the last could never sue upon this covenant because it might subject the covenantor to several actions ; and hence largely his suggestion that purchasers in general attached more importance to covenants for title than was deserved. But his view was not approved by Sugden, who said, "The better opinion, however, seems to be, that an alienee of one of the estates could maintain covenant against the covenantor where the covenants run with the land, and as such an action would lie either for damages, which would be measured by the loss of the assignee, as far as he might be entitled to recover it under the covenant, or for an act to be done, e. g. further assurance, which might properly be confined to the particular proportion of the property. It does not seem that any injustice would arise by suffering several covenants to lie, although it might expose the covenantor to inconvenience ; whereas the denial of the right to each assignee might lead to

§ 215. It is evident, however, that the doctrine which gives to subsequent alienees the right to sue upon the covenants of a prior vendor must be susceptible of much qualification in order to prevent the obvious injustice which would arise from making the latter liable to all the subsequent owners in turn, and thus pay damages more than once for the same breach of covenant.

To obviate such a result, a decision was made in one of the earlier cases in New York, which has, however, been subsequently departed from. In the early case of Kane *v.* Sanger,[2] the defendant conveyed, with covenants of warranty, certain lots to the plaintiff, who in turn conveyed them with similar covenants to different purchasers, who were subsequently evicted, when the plaintiff brought suit on his covenant. It was objected that by his assignment to the different purchasers from himself, the plaintiff had divested himself of all right of action on his vendor's

positive injustice, or if not, to greater inconvenience on their part." Sugd. on Vend. 486, citing Hare *v.* Cator, Cowp. 766 ; Stevenson *v.* Lambard, 2 East, 575 ; Twynam *v.* Pickard, 2 Barn. & Ald. 105 ; Merceron *v.* Dowson, 5 Barn. & Cress. 481 ; Curtis *v.* Spitty, 1 Bing. N. C. 756 ; and see 9 Jarman's Conveyancing, 366. (All these cases, however, except Twynam *v.* Pickard, were actions *against* assignees of a *covenantor*. See also West Lond. Rail. Co. *v.* Lond. & N. W. Rail. Co., 11 Com. Bench, 354.) And this view of the law has been adopted in this country. Schofield *v.* Iowa Homestead Co., 32 Io. 317 ; Dougherty *v.* Duvall, 9 B. Mon. (Ky.) 58 ; White *v.* Whitney, 3 Met. (Mass.) 87 ; Hunt *v.* Amidon, 4 Hill, (N. Y.) 345 ; Van Horne *v.* Crain, 1 Paige, (N. Y.) 455 ; Astor *v.* Miller, 2 id. 68 ; Fields *v.* Squires, 1 Deady, (C. C. U. S. Oreg.) 366 ; McClure *v.* Gamble, 27 Pa. 290 ; Dickinson *v.* Hoomes, 8 Grat. (Va.) 406. So it seems to be considered in England that where the *estate* is divided, as where it becomes vested in a tenant for life with remainder in fee, and the breach of covenant affects the entire inheritance, the owner of each portion of the inheritance can sue for damages proportioned to the extent of his estate. Dart on Vend. (5th ed.) 780, referring to 9 Jarm. Con. by Sweet, 404, and Noble *v.* Cass, 2 Simons, 343. And so where the estate is cut up into undivided shares. Badely *v.* Vigurs, 4 Ell. & Bl. 71. But in Pennsylvania, it has been held that all the parties entitled to the benefit of the covenants for title must join in the action. McClure *v.* Gamble, 27 Pa. 288. "The title which the covenant was intended to assure," said Lowrie, J., "became vested by devise in Gamble for life, with remainder to his children ; and it is objected that the title and the covenant are single, and that all those entitled to the remedy upon it must join in the action. We regard this objection as sound, and as receiving support by the reasoning of Mr. Justice Rogers, in the case of Paul *v.* Witman, 3 W. & S. 409 ; though in that case it was decided only that different owners may properly join. Regarding the tenant for life and the remaindermen as entitled, as against the covenantor, to one seisin and property divided as among themselves into different periods, we think that the action on the covenant given to secure that seisin ought to be single, otherwise the covenantor, not being able to set up the judgment of one against the other claimants, might have to pay to all much more than is required by his covenant, and might be subjected to innumerable actions for a single breach of the same covenant."

[2] 14 Johns. 89.

covenants; but the court held that as the plaintiff was *bound to indemnify* these purchasers, that *liability* entitled him to support his action, and, to avoid the obvious objection that the original vendor might still be liable to these purchasers (on the covenants which had passed with the land to them), it was suggested that the latter were, by their acceptance of the covenants made to themselves by the plaintiff, precluded from suing upon those of the original vendor.[1]

This decision has, however, been since overruled on both these points, and another mode adopted of meeting the difficulty referred to. In the leading case of Booth *v.* Starr, decided in Connecticut in 1814,[2] it was held that the right of action of an intermediate purchaser who had himself parted with all interest in the land did not depend merely upon his prospective *liability* to the purchasers from himself, but that it could not be enforced until that liability should have been fixed by the recovery of damages by them, and their actual payment by him;[3] and in the subsequent

[1] In Wheeler *v.* Sohier, 3 Cush. (Mass.) 222, the court, in commenting upon Kane *v.* Sanger, said, "The grounds of the recovery were that the plaintiff's grantees had mortgaged the premises to him for the purchase money, so that the plaintiff had the legal estate when the covenant was broken, and the defendant had obtained releases from the plaintiff's grantees of all claims and damages sustained in consequence of the covenant, so that the defendant was under no liability to them; and the court held that these releases could not bar the plaintiff's recovery; as, by the mortgage, the seisin of the premises was in the plaintiff, and the mortgage was unsatisfied." These grounds were not, however, the only ones relied on by the court, nor perhaps would they be considered available at the present day in Massachusetts, since it has there been held that although a mortgage technically vests the legal title in the mortgagee, yet the benefit of covenants will, notwithstanding, remain with the equity of redemption, and pass with it to successive purchasers; White *v.* Whitney, 3 Met. (Mass.) 81; see *infra*, p. 326, n. 2; and if it were held that in the case of a mortgage the benefit of a covenant for seisin should attend the legal title in the mortgagee, it would follow that one who had given a mortgage for the purchase money could never sue upon his vendor's covenant, because by the mortgage the right of action had become vested in the covenantor himself, and so merged. The law as to the benefit of covenants following the legal title in the mortgagee is considered more fully, *infra*, § 216 *et seq.*

[2] 1 Conn. 244.

[3] "In the present case," said Swift, J., delivering the opinion of the court, "the grantee or covenantee of the plaintiff has been evicted, but the plaintiff has never been sued, nor has he paid the damages. The question is, whether under these circumstances he can maintain this action against the defendant, who is his immediate covenantor. The last assignee can never maintain an action on the covenant of warranty till he has been evicted. Though the title may be defective, though he may be constantly liable to be evicted, though his warrantor may be in doubtful circumstances, yet he can bring no action on the covenant till he is actually evicted; for till then there has been no breach of the covenant, no damage sustained. By parity of reason, the intermediate covenantees can have no right of action against

case in New York of Withy *v.* Mumford[1] this decision was quoted with approbation, and it was moreover held that the acceptance, by a purchaser, of covenants from his own vendor had no effect whatever upon his rights on the covenants given by the prior vendors in the chain of title; and on both these points many subsequent decisions have been to the same effect.[2]

It may therefore be considered as settled, in accordance with principle and authority, that where one has parted with all his interest in the land, he parts also with all right to or control over the covenants which run with it, and he can only regain that right over them by being made liable upon his own covenants and satisfying that liability;[3] and when the conveyance has been of part of the land only, the same doctrine will, it is apprehended, apply proportionally.

§ 216. But from the doctrine that the benefit of covenants for title passes, with the legal estate, through successive alienations, and vests in and is divisible among its owners for the time being, it would seem in strictness to follow that where a mortgage of the land is given, the benefit of the covenants must, in a court of law, be regarded as passing with the legal estate to the mortgagee. It would indeed be obvious that to the extent of his interest in the land he would be entitled to the protection of the

their covenantors, till something has been done equivalent to an eviction; for till then they have sustained no damage. . . . In the present case, the plaintiff cannot know that his covenantee who has been evicted will ever sue him; he may bring his action directly against the defendant; a recovery in this suit, and payment of the damages, would be no bar; the defendant could then have no remedy but by petition for a new trial, and if the plaintiff in the mean time should become unable to refund the money, the defendant would, by operation of law, be compelled to pay the same demand twice, without redress. But if the principle is adopted that the intermediate covenantee can never sue till he has satisfied the damages, no such injustice can ensue."

[1] 5 Cowen, 137.

[2] Redwine *v.* Brown, 10 Ga. 311; Thompson *v.* Sanders, 5 T. B. Mon. (Ky.) 357; Thompson *v.* Shattuck, 2 Met. (Mass.) 615; Wheeler *v.* Sohier, 3 Cush. (Mass.) 222; Chase *v.* Weston, 12 N. H. 413; Suydam *v.* Jones, 10 Wend. (N. Y.) 184; Baxter *v.* Ryerss, 13 Barb. S. C. (N. Y.) 283; Markland *v.* Crump, 1 Dev. & Bat. (N. C.) 94; Herrin *v.* McEntyre, 1 Hawks, (N. C.) 410; Wilson *v.* Taylor, 9 Ohio, 595; Le Ray de Chaumont *v.* Forsythe, 2 Pa. (old Pa., not Pa. St.) 507; Williams *v.* Wetherbee, 1 Aik. (Verm.) 239. In Griffin *v.* Fairbrother, 1 Fairf. (Me.) 91, the plaintiff brought suit on a covenant of warranty broken after he had aliened the land, and although the action was brought for the benefit of the plaintiff's grantee, so that a judgment in that action would be a bar to any action which the latter might bring against the defendant, who could not therefore be twice charged, it was held that the action could not be maintained.

[3] Allen *v.* Little, 36 Me. 170; Vancourt *v.* Moore, 26 Mo. 98.

covenants,[1] but it would seem that wherever the common law relation of the mortgagee as the holder of the legal title is recognized, he must, on strict principles, absorb the whole benefit of the covenants, to the exclusion, in a court of law, of any subsequent purchaser of the equity of redemption. Thus it has been decided in England that an equity of redemption is neither such an estate as can render an assignee liable for a breach of a covenant for quiet enjoyment of an easement granted out of it,[2] nor such as will carry to an assignee the benefit of a covenant for the payment of rent;[3] and in a later case, where a purchaser having mortgaged the premises was afterwards evicted by a paramount title and sued his vendor, at law, upon the covenants he had received from him, a plea that at the time of the eviction the plaintiff had no estate or interest in the land was held to be a bar to the action.[4] So in Kentucky, where the facts were similar, it was held that so long as the mortgage remained unpaid, the covenants for title vested with the legal estate in the mortgagee.[5]

[1] Tufts *v.* Adams, 8 Pick. (Mass.) 550; White *v.* Whitney, 3 Met. (Mass.) 87. See the last case, *infra*, p. 326, n. 2. McMurphy *v.* Minot, 4 N. H. 251; Cavis *v.* McClary, 5 id. 529.

[2] Mayor of Carlisle *v.* Blamire, 8 East, 487. In this case, Denton granted to the corporation of Carlisle so much of the river Caldew as should be sufficient for their mills, and covenanted that neither he nor his heirs nor assigns should ever divert its course. The defendants were sued as assignees of *all* the estate, right, title, and interest of Denton, and the breach alleged was the erection of a wear or dam by them across the river. They pleaded among other things that they were not assignees of *all* the estate, etc. of Denton, and upon this an issue was joined, and at the trial it appeared that long before the breach of covenant one Wilson was mortgagee of the property, and the defendants were seised only of the equity of redemption as devisees of Denton's heir at law. They were therefore nonsuited, and, as the court *in banc* held, properly. "It is impossible," said Lord Ellenborough, "to say that the defendants were assignees of the estate of Denton within the sense and meaning of the terms in which this issue was framed, and which terms respect that description and quality of estate alone, namely, legal estate, in virtue whereof parties are at all liable to actions of covenant as assignees."

[3] Pargeter *v.* Harris, 7 Q. B. 708.

[4] Thornton *v.* Court, 3 De Gex, M. & G. 293. See this case noticed more fully, *infra*, § 219.

[5] McGoodwin *v.* Stephenson, 11 B. Mon. (Ky.) 22. "The covenant in the deed," said the court, "is the usual covenant of title, and runs with the land. It is well settled that a mortgagor, even after forfeiture, is considered *in equity* as still having the ownership of the estate, the land being only a pledge or security for the mortgage money. *At law*, however, his rights stand on a different footing. . . . Whenever the money specified in the mortgage has been paid, the mortgage is fully satisfied, and even without a formal release the title by the act of payment reverts to the mortgagor, and of course in such case he could maintain the action, having been thus reinvested with the legal title; but so long as the debt remains unpaid and the mortgage is in full force unsatisfied he is deprived of the legal estate, and cannot sue for a breach of the warranty of title."

§ 217. Such a course of decision would obviously lead to the embarrassing result that where land is sold with covenants for title, and the purchaser has given to his vendor a mortgage for any part of the purchase money, no matter how small, the benefit of the covenants, passing with the legal estate, would therefore vest in the same party who was also bound by them, and hence the purchaser could not, even upon an eviction of the whole estate, have any remedy in a court of law if at the time of his eviction the mortgage remained unpaid, but his only remedy would be in equity.[1]

§ 218. It is, however, familiar that in England[2] and in many of our States the doctrine that "a court of law knows nothing about mortgagor and mortgagee"[3] has been much relaxed, and it is not necessary to have recourse to equity to establish the consequences of considering the mortgage as a mere security for the payment of the debt. This has been carried so far in New York that an assignee of the mortgage takes it subject not only to the equities of the mortgagor, but also to the equities of those who have succeeded to his estate,[4] and hence in that State the rule enforced in the cases just cited would meet with little favor, and it has there been decided that where land is conveyed with a covenant of warranty and a mortgage given to secure the unpaid purchase money, and the mortgage is afterwards foreclosed and

[1] Such was the decision in Kavanagh *v.* Corp. of Kingston, 39 U. Can. Q. B. 415, and Claxton *v.* Gilbers, 24 id. C. P. 500. See also *infra*, Ch. XI.

[2] Under the Judicature Act (1873) not only are law and equity concurrently administered by the same courts, but it is expressly provided that "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only." 36 & 37 Vict., c. 66, L. R. viii. Stat. 306 *et seq.*

[3] Per Bayley, J., in Partridge *v.* Bere, 1 Dowl. & Ryl. 273; cited in McGoodwin *v.* Stephenson, *supra*, p. 324, n. 5. See Cross *v.* Robinson, 21 Conn. 387, *infra*, Ch. XI.

[4] Van Rensselaer *v.* Stafford, Hopk. Ch. (N. Y.) 569; Stafford *v.* Van Rensselaer, 9 Cowen, (N. Y.) 316; Poillon *v.* Martin, 1 Sandf. Ch. (N. Y.) 569. In the note to Row *v.* Dawson, 3 Leading Cases in Equity, Judge Hare says: "Such a course of decision seems to be both unsound and dangerous. A mortgage is undoubtedly a *chose in action*, but it is a *chose in action* fortified and supported by the possession of the legal title in the estate mortgaged. . . . It is accordingly well settled in England, that the assignment of a mortgage for value and without notice gives the assignee all the rights of a *bona fide* purchaser, and exonerates him from all other equities than those of the mortgagor." And such is the law in Pennsylvania. Pryor *v.* Wood, 31 Pa. 142.

the premises sold, the benefit of the covenants passes to the purchaser, notwithstanding the mortgage.[1]

And in other cases elsewhere, the doctrine that covenants for title will pass with the equity of redemption has been distinctly recognized. Thus in a case in Massachusetts, the owner of certain premises after having mortgaged them conveyed them with a covenant of general warranty to a purchaser whose estate was afterwards levied upon by a creditor and sold to the plaintiff, who after having been evicted by the mortgagee brought suit upon the covenant, when it was objected that all the benefit of the covenants for title had passed with the legal estate to the mortgagee, and hence that the plaintiff could not recover; but the court held that although a mortgagee was certainly entitled to the benefit of the covenants so far as necessary to protect his interest, yet that, subject to this, their benefit would remain with the equity of redemption and pass with it, whether by voluntary or involuntary alienation, to its purchaser.[2] Such a course of decision is certainly supported by strong reasons of convenience, as it is by the weight of recent authority in those States where the mortgagor is invested with most if not all the incidents of legal as well as equitable ownership.[3]

[1] Town *v.* Needham, 3 Paige, (N. Y.) 546; Brown *v.* Metz, 33 Ill. 339; see also Andrews *v.* Wolcott, 16 Barb. S. C. (N. Y.) 21.

[2] White *v.* Whitney, 3 Met. (Mass.) 81. In this case, Shaw, C. J., dwelt at length on the question involved. The opinion is given on p. 344 *et seq.* of the fourth edition of this treatise.

[3] Harper *v.* Perry, 28 Io. 58; Devin *v.* Hendershott, 32 id. 192; Rose *v.* Schaffner, 50 id. 483; Wilson *v.* Widenham, 51 Me. 566; Ely *v.* Hergesell, 46 Mich. 325; Davidson *v.* Cox, 11 Neb. 250; Wright *v.* Sperry, 21 Wis. 334. So where premises were conveyed in mortgage with covenants for title, and the mortgagor afterwards released to the mortgagee, although this might operate as a merger of the lesser estate in the greater, yet it was held that it did not extinguish the covenants contained in the mortgage. Lockwood *v.* Sturdevant, 6 Conn. 373. "Mortgage deeds," said Hosmer, C. J., who delivered the opinion, "generally, if not universally, are secured by covenants of title, and the equity of redemption is extinguished by release or foreclosure. In the event of a release from the mortgagor, it cannot be presumed to have been the intention of the parties to extinguish the mortgage title, and in both events, of release and foreclosure, it would be unjust and inconvenient to hold this as legal doctrine. The title to the estate may be found fatally defective, and of this the case under discussion is a full illustration. That the debts secured by the mortgage should faithfully be paid was the intention of both parties, and to this end the release was executed. The mortgage title, guarded by covenants, is the plaintiff's only security, and it would be flagrantly unjust and in opposition to general convenience to hold that the title by mortgage should merge and the plaintiff be remediless. Upon the same principle, upon decree of foreclosure, the mortgagee would be without remedy if his title should prove defective." And this decision was approved and

As was recently said of this class of cases: "It is maintained that they make an exception to the general rule that covenants run only with the land, or with the legal title. We think, however, they are in harmony with it, and only decide that for some purposes the legal title is in the mortgagee, and for others in the mortgagor."[1] In fact, the only difference between a mortgagor's equity of redemption and any other equitable title is that the former has struggled into recognition in a court of law, where its place is now firmly established, at least in most of our States. As to other equitable titles, an English author has somewhat recently said (before the passage of the Judicature Acts): "Where the estate is merely equitable, there can be no assignee at law, and the covenants cannot be enforced at law by an equitable assignee."[2] It has, however, been somewhat lately held in Iowa, that where a purchaser of land borrows the purchase money from a third party, to whom, as security, the conveyance is made, the former is entitled to the benefits of the covenants contained in the deed to the latter.[3]

§ 219. And even where a court of law deems itself forced to consider the mortgagee as the holder of the legal estate, so as to become entitled to the benefit of all the covenants which pass with it, to the exclusion of the owner of the equity of redemption, yet the right of the latter to the interposition of equity is sufficiently obvious upon general principles.[4] This was well exemplified in England (of course before the passage of the Judicature Acts) in the case of Thornton *v.* Court,[5] where the plaintiff, having purchased certain freehold property of the defendant with a covenant for quiet enjoyment, afterwards mortgaged it, and was subsequently evicted under a paramount title, when he brought suit against the defendant upon the covenant. The latter pleaded that at the time of the eviction the plaintiff had conveyed the legal estate to the mortgagee, and had no estate nor interest in the premises remaining in him. This was a bar to the plaintiff's action at law, and the defendant subsequently paid off the mortgage, and received from the mortgagee an indorsed acknowledgment of the receipt of the mortgage money, and that it was in full

followed in Ohio in Lloyd *v.* Quimby, 5 Ohio, 264. See also Andrews *v.* Wolcott, 16 Barb. S. C. (N. Y.) 21.

[1] Wright *v.* Sperry, 21 Wis. 334, *supra.*

[2] Dart on Vend. (5th ed.) 780.

[3] Harper *v.* Perry, 28 Io. 58, *supra.*

[4] See Dart on Vend. (5th ed.) 780.

[5] 3 De Gex, M. & G. 293

satisfaction of the mortgage debt and of all demand which the mortgagee might have against the defendant under the covenant contained in the deed to the plaintiff. The latter then filed a bill, praying that he might be declared entitled to the benefit of the covenant for quiet enjoyment as against the defendant, for a reference to a master to assess the damages, and for payment by the defendant of such sum as might be awarded therefor, deducting what should be found to have been properly paid by the defendant in satisfaction of the mortgage, and the court was clearly of the opinion that the plaintiff was entitled in equity to the benefit of the covenant, and directed an action at law to be brought by the plaintiff, in which the defendant should be restrained from setting up in his defence, by pleading, evidence, or otherwise, the mortgage executed by the plaintiff or the indorsed release of the covenant.[1]

[1] "The defendant in this case," said Lord Justice Bruce, "entered into a covenant for the peaceable enjoyment by the plaintiff of an estate which the defendant sold to him. The plaintiff having paid his purchase money entered into possession accordingly. The plaintiff then mortgages his property once or twice, as he was entitled to do, so parting with the legal estate and with it the legal right to bring an action of damages; but he became entitled to redeem the property, and to reinstate himself in the fulness of his original right. In this state of things an adverse or paramount title is asserted, and the plaintiff, being in possession, defends himself at law unsuccessfully. The paramount claim, which was adverse to all the plaintiff's rights, succeeds, and the plaintiff is evicted. No man can doubt that, in that state of circumstances, the plaintiff has a right to recover some damages, some substantial damages, from the covenantor whose covenant has thus been broken. The defendant, the covenantor, being aware of this, applies to the mortgagee, in whom was the legal estate, as I have said — a legal estate carrying with it, of course, the whole right to sue on the covenant — and pays him off, acquiring thereby the right the mortgagee had, and takes at the same time an acknowledgment from the mortgagee that the payment is in full of all demands upon the covenant, thereby creating, according to my present opinion, a case of accord and satisfaction, rendering it impossible for him ever to be sued on the covenant. The plaintiff, therefore, is left entirely without remedy in a court of law by the act of the defendant, and he comes to the court asking (whether in a perfect form or not is a matter unimportant) for an assessment of damages either here or in a court of law, which he would have plainly had a right to have assessed in a court of law but for the right acquired by the defendant. I confess, if that be, as I believe it is, the true state of things, there appears to be only one course to be taken. There is a right in the mortgagee, or the person to whom the mortgage has been transferred, to payment of every shilling of his advance, with interest; and there must also be assured to the plaintiff a right to ascertain the amount of damages to which he is entitled at law. The amount of damages cannot, I think — and that seems to be the opinion of my learned brother also — be ascertained by us without the consent of both parties to the litigation. Perhaps, even if both parties consented, we might decline to take upon ourselves such a jurisdiction; but I am rather disposed to think that upon the request of both parties we might take upon ourselves the burden of so doing." The

§ 220. It has been already stated that where one has parted with all his interest in the land, he parts also with all right to or control over the covenants which run with it,[1] and it necessarily follows that a release of those covenants *made after such conveyance*[2] will be as wholly ineffectual against the purchaser as a second conveyance of the land itself would be.[3]

following was the order made in the case : "The plaintiff by his counsel undertaking to bring, in his own name, such action at law as he shall be advised, on the covenants in the pleadings mentioned, and to deliver the declaration in such action within three weeks from the date of this decree, and to proceed to the trial of the said action at Chester with due diligence, it is ordered that the defendant be restrained from setting up in his defence to such action, by pleading, or in evidence, or otherwise, the deed or deeds of mortgage executed by the plaintiff, or the memorandum indorsed on the mortgage deed of the 25th of April, 1842, in the pleadings mentioned ; and it is ordered that execution in the said action do not issue without the leave of this court. Reserve further directions and costs till after the trial of the said action. Liberty to apply." This, of course, was before the Judicature Acts. Under them, the equity could have been administered in the original court.

[1] *Supra*, § 215, p. 323.

[2] For the effect of a release of the covenants made by one who is at the time the owner of the land, see *infra*, § 223.

[3] Middlemore *v.* Goodale, Cro. Car. 503, *infra*, p. 332, n. 1; Chase *v.* Weston, 12 N. H. 413 ; Crooker *v.* Jewell, 29 Me. 527; Prescott *v.* Hobbs, 30 id. 346. And see the provisions of the Revised Statutes of Maine, cited *supra*, § 211, which leave the common law in force as to covenants which run with the land. Wilson *v.* Widenham, 51 Me. 566 ; Alexander *v.* Schreiber, 13 Mo. 271 ; Cunningham *v.* Knight, 1 Barb. S. C. (N. Y.) 405. Lewis *v.* Cook, 13 Ired. L. (N. C.) 193, was decided upon an analogous principle. A man and his wife, seised in her right, sold land to Harrison by a conveyance deficient as to the private examination of the wife, and which therefore only passed the husband's life estate. The purchaser resold, with a general covenant of warranty to Howerton, who sold again to Green, in April, 1842, by a deed which contained a clause assigning "all the covenants in the deed of Harrison warranting the title of said land, and all other covenants in said deed contained." In March, 1842, however, the land had been levied upon under execution against Howerton, and some months after was sold at sheriff's sale, and purchased by the plaintiff, who continued in possession until the death of the first vendor, when he was evicted by the heirs of the wife, and brought covenant against the executor of Harrison. It was objected to his recovery, that the deed from Howerton to Green not only professed to pass the estate, but expressly passed the covenant of warranty ; and that although it was overreached in regard to the *estate* by the sheriff's sale and deed, yet that this could not affect the assignment of the covenant, the benefit of which had passed to Green. "But," said the court, "this cannot be so. The incident cannot be passed without the principal. If the principal does not pass, how can the incident pass ? They are inseparable. Can the substance pass without the shadow, or the shadow without the substance ? There is no authority or reason to support the proposition, that a covenant annexed to an estate and running with it can be severed and assigned so as to be passed by itself and restrained by itself and thereby give an independent cause of action. To show the absurdity of the idea, take this very case. The plaintiff, under the deed of the sheriff, goes into possession, and is evicted by title paramount ; he has a cause of action, but the argument is, he has no covenant to sue on ; and Green has a covenant, but no cause of action, for he has not been evicted. So the covenantor escapes from his obligation

§ 221. So long, however, as the covenantee remains the owner of the land, a release by him to his covenantor of the covenants given by the latter will of course be binding not only between themselves,[1] but against an assignee. It would seem that in England the burden of a covenant cannot be removed otherwise than by an instrument of equal solemnity with that creating it, upon the application of the maxim, *Quo modo ligatur eodem modo dissolvitur*.[2] On this side of the Atlantic, however, there have been many decisions to the effect that a parol dispensation with the performance of a sealed contract is valid, upon the ground that although the contract itself cannot be dissolved unless by a specialty, yet that the rights proceeding from it may be varied or released by matter *in pais*,[3] or even by parol.[4]

and cannot be sued by either. Again, is it reasonable or right that a debtor finding his estate bound by executions of prior *teste* should have the power to sever from the estate covenants annexed thereto for its protection, and assign them to a third person, whereby the estate thus 'stripped naked,' would sell for nothing, and his creditors be defrauded?"

[1] Spoor *v.* Green, L. R. 9 Exch. 111. Thus it has been frequently held that a vendor may be a competent witness in support of the title of his vendee, upon being released from the covenants for title given by him. Arnold *v.* McNeill, 17 Ark. 185; Clark *v.* Johnson, 5 Day, (Conn.) 373 (overruling Abby *v.* Goodrich, 3 id. 433); Littlefield *v.* Getchell, 32 Me. 392; Paul *v.* Frost, 40 id. 293; Field *v.* Snell, 4 Cush. (Mass.) 504; Ely *v.* Hergesell, 46 Mich. 325; Cooper *v.* Granberry, 33 Miss. 117; Sargeant *v.* Gutterson, 13 N. H. 467; Van Hoesen *v.* Benham, 15 Wend. (N. Y.) 165; Ford *v.* Wadsworth, 19 id. 334; Cunningham *v.* Knight, 1 Barb. (N. Y.) 405; Rhines *v.* Baird, 41 Pa. 262; Lawrence *v.* Senter, 4 Sneed, (Tenn.) 52. Of course without such a release a vendor would not be a competent witness; Elliott *v.* Boren, 2 Sneed, (Tenn.) 663; unless his interest were equally balanced; Robb *v.* Lefevre, 7 Cl. (Io.) 150; or unless he had conveyed without covenants. Gunter *v.* Williams, 40 Ala. 572; Doe *v.* Cassidy, 9 Ind. 66; Thomas *v.* Maddan, 50 Pa. 265.

[2] Rogers *v.* Payne, 2 Wilson, 376; Kaye *v.* Waghorne, 1 Taunt. 428; Cordwent *v.* Hunt, 8 id. 596; Harris *v.* Goodwyn, 2 Man. & Grang. 405, note (*a*) of Sergeant Manning to May *v.* Taylor, 6 id. 262; West *v.* Blakeway, 2 id. 729; Platt on Cov. 591.

[3] Drury *v.* Improvement Co., 13 Allen, (Mass.) 168, where the question arose upon the release of a covenant of warranty. Strohauer *v.* Voltz, 42 Mich. 444.

[4] U. S. *v.* Howell, 4 Wash. (C. C. U. S.) 620; Fleming *v.* Gilbert, 3 Johns. 528; Langworthy *v.* Smith, 2 Wend. (N. Y.) 587; Dearborn *v.* Cross, 7 Cowen, (N. Y.) 48; Leavitt *v.* Savage, 16 Me. 72; Marshall *v.* Craig, 1 Bibb, (Ky.) 379. Many of the cases suggest the analogy between such a parol dispensation and a license to exercise dominion over land, which, while unrevoked, is a justification for any acts done under its authority, and some of the earlier English cases were in harmony with those just cited; 1 Roll. Abr. 433, pl. 5; id. 455, pl. 1; Blackwell *v.* Nash, 1 Strange, 535; and in Jones *v.* Barkley, 2 Douglas, 684, it was held that a tender of performance and waiver of it (the evidence of which must always rest in parol) were equivalent to actual performance. The later English cases, however, enforce a more technical rule. It must also be observed that to render a parol dispensation of performance of a covenant valid, it must have occurred before breach, as after the covenant is broken nothing short of an accord and satisfaction will be a bar

§ 222. But whatever may have been the agreement between the covenantor and the covenantee as respects the dispensation of the covenants or alteration of the rights which they confer, it has been held in New York that an assignee of the land, and consequently of the covenants which run with it, cannot be affected by any *equities* created at the time the latter were entered into, of which he had no notice. In Suydam *v.* Jones,[1] premises which were subject to a mortgage were conveyed with covenants of warranty and for quiet enjoyment, and in a suit on these covenants by an assignee of the purchaser, a plea that at the time of the execution of the defendant's deed it had been agreed that the purchaser should assume and pay the mortgage as part of the consideration was held bad on general demurrer, the court saying, "If the covenant passes to the assignee with the land, it cannot be affected by the equities existing between the original parties, any more than the title to the land itself," and that "to allow a secret agreement in opposition to the plain import of a covenant running with the land, to control and annul it in the hands of a *bona fide* assignee, would be a fraud upon such assignee which the law would not tolerate;" and in the subsequent case of Greenvault *v.* Davis,[2] this decision was approved, and it was held that although as between covenantor and covenantee the former might, in mitigation of damages, show the consideration to have been actually less than that expressed in the deed, yet such evidence was inadmissible in an action brought by the assignee of the covenantee.[3] So too, where a certain bond was considered to be, in equity, a release of a covenant of warranty, it was held that as there was nothing in the case to show that the purchaser from the covenantee was apprised of that equitable release, he and those claiming under him could not be deprived of the benefit of the covenant;[4] and the doctrine of these cases has been recently recognized and applied in others.[5]

to an action. U. S. *v.* Howell, 4 Wash. (C. C. U. S.) 620; Shaw *v.* Hurd, 3 Bibb, (Ky.) 371; notes to Prince *v.* Case, in 2 Am. Lead. Cas.; note to Cumber *v.* Wane, in 1 Smith's Lead. Cas.

[1] 10 Wend. (N. Y.) 180.

[2] 4 Hill, (N. Y.) 643.

[3] But see Martin *v.* Gordon, 24 Ga. 536, *infra*, p. 345, n. 4.

[4] Kellogg *v.* Wood, 4 Paige Ch. (N. Y.) 578, 616.

[5] Brown *v.* Staples, 28 Me. 583; Hunt *v.* Orwig, 17 B. Mon. (Ky.) 84; Illinois Land Co. *v.* Bonner, 91 Ill. 114; Sage *v.* Jones, 47 Ind. 122; Alexander *v.* Schreiber, 13 Mo. 271, cited at length in the fourth edition of this treatise, page 351 *et seq.*

§ 223. But although a purchaser may not be affected by *equities* existing between the covenantor and covenantee of which he has no notice, yet it would seem that a *release* of such covenants as run with the land, given by the covenantee while still the owner of the land, would, at common law, be a bar to an action brought upon those covenants by a subsequent purchaser from him.[1] So too, where, either by act of law or of the parties, the estate conveyed is revested in the covenantor, the covenants will be deemed to be extinguished,[2] but not unless the estate so revested were the identical one conveyed,[3] as otherwise the rights of third parties

[1] Thus in the early case of Middlemore *v.* Goodale, Cro. Car. 503, "the defendant, by indenture, enfeoffed J. S. of such lands, and covenanted for himself and his heirs with the feoffee, his heirs and assigns, to make further assurance upon request, which lands J. S. conveyed to the plaintiff, who brings this action, because the defendant did not levy a fine upon the plaintiff's request. The defendant pleaded release from J. S., with whom the first covenant was made, and it was dated after the commencement of this suit; and thereupon the plaintiff demurred, and all the court agreed that the covenant goes with the land, and that the assignee at the common law, or at leastwise by the statute, shall have the benefit thereof; secondly, they held that although the breach was in the time of the assignee, yet if the release had been by the covenantee (who is a party to the deed and from whom the plaintiff derives) before any breach, or before the suit commenced, it had been a good bar to the assignee from bringing this writ of covenant. But the breach of the covenant being in the time of the assignee, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee cannot release this action wherein the assignee is interested: whereupon, rule was given that judgment should be entered for the plaintiff." (In referring to this case in his Common Law, 379, Judge Holmes says: "The covenantee even after assignment remains the legal party to the contract. The assignee comes in under him and does not put an end to his control over it, until by breach and action a new right attaches in the assignee's person, distinct from the rights derived from the *persona* of his grantor.") The case was cited with approbation in Brown *v.* Staples, 28 Me. 503, as deciding that a covenantee, while owner of the land, might release or annul the covenant, and that the land would pass to his grantee discharged of its benefit; but the case of Brown *v.* Staples itself decided no more than that when after the covenant had been annulled the purchaser bought "*with a knowledge of the facts*, he could not acquire more extensive rights than the covenantee had;" but in a case in Georgia, it was said: "If the bond had been a release, it would, according to Middlemore *v.* Goodale, Cro. Car. 503, have extinguished the covenant, and therefore would have prevented it from passing to the purchaser, and this whether she purchased with or without notice of such release." Martin *v.* Gordon, 24 Ga. 536. See this case *infra*, p. 345, n. 4.

[2] Litt. § 743; Co. Litt. 490 *a*; for, says Preston, Touchstone, 201, "all the benefit of the warranty was in the person liable by force of the warranty." Brown *v.* Metz, 33 Ill. 339; Silverman *v.* Loomis, 104 id. 137; Goodel *v.* Bennett, 22 Wis. 565.

[3] "But if a man make a feoffment in fee with warranty to the feoffee his heirs and assigns, and the feoffee reinfeoff the feoffor and his wife, or the feoffor and any other stranger, the warranty remaineth still ('for the sake,' says Preston, Touchstone, 201, 'of the wife and the stranger'); or if two do make a feoffment with warranty to one and his heirs and assigns, and the feoffee reinfeoff one of the feoffors,

might be prejudiced.[1] In a somewhat recent case in Massachusetts, it was said that there were peculiar reasons why the release of the covenants for title might be so closely connected with the conveyance of real estate as to become a proper subject of record in the registry of deeds;[2] and if so, it would seem to follow that an unrecorded release would be inoperative as against a purchaser without notice; and although in a somewhat recent case in Maine the court seemed to be of opinion that such a release did not come within the registry acts,[3] yet lately in Pennsylvania it was distinctly held that a release of the covenants for title fell within the words and the spirit of the registry acts of that State.[4]

the warranty doth also remain." Co. Litt. 390 *a*; Birney *v.* Hann, 3 Marsh. (Ky.) 325; Hobbs *v.* King, 2 Met. (Ky.) 139, in which last case the latter part of the opinion of the court shows, what does not otherwise appear in the report of it, that the land originally conveyed was that of the wife.

[1] See *supra*, § 220.

[2] Field *v.* Snell, 4 Cush. (Mass.) 50. The court, in deciding that before a grantee had incumbered or conveyed the land, he could release his grantor from the covenants for title, so as to make him a competent witness (the same point as was decided in the case just cited), thus considered the question arising as to the effect upon a subsequent purchase of recording such a release. "Treating the release as a mere release of an ordinary kind, or writing obligatory," said Dewey, J., who delivered the opinion, "it would not be a proper subject for record in the registry of deeds. But as a release of a covenant running with the land and attached to a deed already the subject of record, there are peculiar reasons why such a release might be held to be so closely connected with the conveyance of real estate as to become a proper subject for record in the registry of deeds. If the release materially affects the title and interest in real estate, or any incidents therewith connected, then such instrument, thus qualifying or releasing an interest in the estate, or in any covenants connected therewith, that might be a subject of sale and transfer as incident to a conveyance of the land, would, by being duly recorded, give an effectual notice to a subsequent purchaser, as a release or quitclaim of some portion of the land, or of some undivided interest in the estate, or a grant of an easement on the same, of all which latter instruments the record would be effectual notice to a subsequent purchaser. These considerations will have their proper weight, whenever a case arises upon such covenant of warranty, by an action instituted in favor of a purchaser taking a conveyance after his grantor has executed such release, and after the release is recorded. It will in such case become necessary to decide the question, whether such release, duly executed and recorded in the registry of deeds, will effectually discharge the grantor from the covenant of warranty, as respects an assignee of the land taking the same subsequently."

[3] Littlefield *v.* Getchell, 32 Me. 392. The court expressed the opinion that "purchasers are not entitled to regard the registry as affording information respecting the rights of action on covenants contained in the deeds recorded," though the decision itself was limited to the point that a release to a covenantor, by a purchaser from him, would be good as between themselves, so as to render the former a competent witness for the latter.

[4] Susquehanna Coal Co. *v.* Quick, 61 Pa. 339. "The release of all warranties, covenants, and liabilities contained in the deed from Q. to Q.," said the court, "fell within the words of the act of the 18th of March, 1775, as a deed concerning lands, tenements, and hereditaments, and was therefore entitled to be proved, acknowledged, and recorded. A general war-

§ 224. A much more important connection between the registry acts and the covenants for title arises from the effect given to the latter by a large class of American cases, of passing an estate by estoppel.[1]

§ 225. But in a former part of this chapter it has been shown that although all the covenants for title, without distinction, run with the land until breach, yet that the covenants for seisin, for right to convey, and against incumbrances are, in most of our States, practically deprived of this capacity by being held to be broken, if at all, as soon as made.[2] Hence the foregoing remarks must be limited in their application to the covenants for quiet enjoyment, for further assurance, and of warranty.

But as respects the three covenants first named, there still remains to be considered the effect of their release, or of a conveyance of the land, upon the liabilities and rights of the parties, and as the same principles apply equally to each of these covenants, it will be understood, in order to avoid repetition, that when the covenant for seisin is spoken of, the same remark applies to the covenants for right to convey and against incumbrances.

Wherever it is held that the breach of the covenant for seisin occurs at the moment of its creation, it must of course follow that a subsequent assignment of the land conveys to the purchaser no legal right to sue upon the broken covenant. That right remains in the covenantee and his personal representatives.[3] But in case he has parted with the land, if notwithstanding such conveyance

ranty is a real covenant descending with the title, and passes to the assigns by its express terms. It is often important to the purchaser to see that the title is defended by covenants of warranty. It is a part of the deed, and evidently concerns the land which is conveyed by it. Perhaps it might be important the release should be recorded to protect the warrantor against suit of a subsequent purchaser without notice."

And as has been well remarked, "As covenants for title are a valuable part of an estate, the release seems so far to partake of the nature of a conveyance of a portion of the estate, that the publicity of record *ought* to be required for the protection of purchasers. But when a release is not for the sake of any benefit to the covenantor, but for some collateral purpose, as to qualify him as a witness, and there is no intention or design to do anything beyond that specific purpose, especially when, as is usual, no consideration is paid, and the design of the release is as well or even better accomplished by restricting the operation of the release to that specific design, we feel confident that the courts will sustain the claims of subsequent owners to the benefit of the covenants, especially when there is no notice of the release." Essay in 11 Amer. Law Reg. 265, 266.

[1] See *infra*, Ch. XI.

[2] *Supra*, § 204 *et seq.*

[3] The provisions of the statutes of Maine and Colorado, cited *supra*, § 211, of course except those States from these remarks.

he can, irrespective of the condition of things between his purchaser and himself, recover damages measured by the consideration money, it would follow that the possession of a covenant for seisin gave much greater rights than the possession of a covenant of warranty, and that one who had sold the land and received the consideration therefor could in addition recover back the consideration he had himself paid; and this, in case he had sold without covenants, without any liability over on his part.[1] And if, on the other hand, his technical right of action be allowed to yield him no more than nominal damages, it would seem that for all practical purposes the covenant for seisin is as useless to one who has parted with the land to which it related as a covenant of warranty,[2] and as the assignee of the land is, by the operation of

[1] Thus in Davis *v.* Lyman, 6 Conn. 249, the defendant, who had sold land with a covenant against incumbrances, upon being sued by his covenantee, who averred as a breach the existence of an outstanding mortgage, pleaded that the plaintiff had conveyed the land to a third party, who had before the suit was brought released the defendant from all liability on his covenant; but the court held that the covenant being broken as soon as made did not pass with the land to the purchaser, and that he therefore had no right to release it, and moreover that the covenantor's right to recover damages could not be affected by his having parted with the land. It would seem, however, that as the plaintiff had in this case paid nothing towards the extinguishment of the mortgage, his damages should, according to the weight of authority (*supra*, § 192), have been but nominal. In Massachusetts, however, in Cornell *v.* Jackson, 3 Cush. 509, where one who had received a covenant for seisin brought suit upon it after he had parted with the land to which it related, the defendant's counsel contended that the plaintiff was entitled to nominal damages only, because, as it was said, he had suffered no actual damage, having conveyed by a deed of release all his right and title to the land in dispute without any covenant of warranty, except as to any person claiming from, by, or under him. But the court was of opinion that such a rule of damages could not be maintained on principle or authority; and relying on Medbury *v.* Watson, 6 Met. 246, held that the plaintiff had a right of action on the breach of the covenant of seisin, immediately after the delivery of the deed; and his release or sale of the property, years after, could not affect the amount of damages he was before entitled to recover. It would seem, however, that the grounds of this decision must rest rather upon their own intrinsic merit than upon any analogy to Medbury *v.* Watson. That was an action for fraudulent representations, and the court held that "what the party sold the property for is not the rule by which to measure the damages; otherwise it might make the question of fraud to depend upon the rise or fall of the property in the market upon fluctuations in the value arising from causes in no way connected with the fraud complained of." In Keith *v.* Day, 15 Verm. 668, moreover, a purchaser took from his vendor a covenant against a previous incumbrance, being a rent payable to the University of Vermont. He then resold part of the land with a covenant against all claims, "except a yearly rent to the University," and it was held that he could not recover from his vendor damages measured by the whole value of the incumbrance, as he was under no liability to his own vendee by reason of it, having excepted it from the operation of his covenants.

[2] Such was the decision in Wyman *v.*

the technical rule referred to, disabled from suing on the covenant, it becomes useless for all purposes except so far as the assignee may be allowed to sue upon it in the name of the covenantee or his personal representatives. Such a dilemma seems, however, necessarily to result as a consequence of separating the nominal from the substantial breach of the covenant for seisin.

§ 226. It becomes necessary, therefore, in this connection, to consider the extent to which the assignee may obtain the benefit of these covenants, by a suit in the name of his assignor.

It is familiar that although by the common law *choses in action* were incapable of assignment, yet that such assignments were from an early day recognized and enforced by courts of equity, who adopted in this particular the rule of the civil law,[1] and in modern times the common law courts have largely acted upon the same principle,[2] and though they still hold it necessary that the original party shall appear upon the record as the plaintiff, yet they permit his name to be used by the party actually damnified, and protect the latter from any fraud upon his rights committed by the former,[3] and hence (as in the cases just referred to[4]) a release from the party originally entitled to the benefit of a contract to the party originally bound by it, made after notice to the latter of its assignment to a third person, is not at the present day, either in a court of law or equity, suffered to defeat the rights of the assignee in an action brought by him against the original debtor.[5]

Ballard, 12 Mass. 304, where land which was subject to a mortgage was sold with covenants against incumbrances and of warranty. The purchaser having resold the property to one who was evicted, sued on the covenant against incumbrances. It was held that the covenant being broken as soon as made, he was indeed entitled to damages, but they could be no more than nominal, as the defendant would be still liable on the covenant of warranty to the evicted purchaser.

[1] See Story's Eq. Juris. § 1047 *et seq.*; 2 Spence's Eq. Juris. 850 *et seq.*; note to Row *v.* Dawson, 3 Lead. Cas. in Equity.

[2] Master *v.* Miller, 4 Term, 340; Welch *v.* Mandeville, 1 Wheat. (S. C. U. S.) 235, and note; s. c. 5 id. 277; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34.

[3] Legh *v.* Legh, 1 Bos. & Pull. 447; Manning *v.* Cox, 7 Moore, 617; Riddell *v.* Riddell, 7 Sim. 529; Crooker *v.* Jewell, 29 Me. 530; Blin *v.* Pierce, 20 Verm. 25; Johnson *v.* Irby, 8 Humph. (Tenn.) 654; Dickinson *v.* Hoomes, 8 Grat. (Va.) 407; Hartford Ore Co. *v.* Miller, 41 Conn. 112; Rev. St. of Maine, *supra*, § 211; note to Row *v.* Dawson, *supra*.

[4] *Supra*, § 220 *et seq.*

[5] Cowan *v.* Shields, 1 Overton, (Tenn.) 314; Dunn *v.* Snell, 15 Mass. 485; Eastman *v.* Wright, 6 Pick. (Mass.) 316; Andrews *v.* Beecker, 1 Johns. Cas. (N. Y.) 411; Raymond *v.* Squire, 11 Johns. (N. Y.) 47: Suydam *v.* Jones, 10 Wend. (N. Y.) 180; Phillips *v.* Clagett, 11 Mees. & Welsb. 84; Thornton *v.* Court, *supra*, § 219.

And as the obstacle which prevents an assignee from suing on these covenants is merely technical, it may be presumed that if the American courts deem themselves restrained by authority from getting over it and adopting the English rule, they will at least be prepared to sustain a suit in the name of the original covenantee, for the benefit of those claiming under him by purchase.[1] This must be the case if an assignee of the land be held to be an equitable assignee of the covenant, and as such must certainly be his position when the covenant is expressly assigned at the time of the conveyance, it would seem that the mere conveyance of the land may be thought to imply a transfer of the covenant, on the general rule that the assignment of the principal draws with it the accessory.[2]

So far, therefore, as the covenants for seisin and for right to convey are concerned, this doctrine may perhaps serve to obviate the inconveniences occasioned by the American rule that these covenants are incapable of being taken advantage of by an assignee. The name of the original covenantee might appear as plaintiff on the record, and the injury to the party actually damnified be regarded as forming the measure of damages.[3]

[1] As was done in the cases of Collier *v.* Gamble, 10 Mo. 467 ; Lawless *v.* Collier, 19 id. 480, *supra*, § 276, n. 4 ; Alexander *v.* Schreiber, 13 id. 271, *supra*, p. 331, n. 5 ; Peters *v.* Bowman, 98 U. S. 59 ; Cole *v.* Kimball, 52 Verm. 643 ; and see the remarks to this effect in Clark *v.* Swift, 3 Met. (Mass.) 395 ; and those *contra* in Kenney *v.* Norton, 10 Heisk. (Tenn.) 384, 387.

[2] Roberts *v.* Levy, 3 Abbott's Pract. R. (N. S.) 316 ; Wright *v.* Sperry, 21 Wis. 335.

[3] Of course a different rule prevails in States where an action is required to be brought in the name of the real party in interest ; Bliss on Code Pleading, § 47 ; Sinker *v.* Floyd, 4 N. East. Rep. 10 ; though even this rule is subject to exception in the case of land held adversely ; Bliss on Code Pleading, § 23 *a*.

The exercise of equitable jurisdiction in sustaining the rights of an assignee, when a technical difficulty stood in his way, was well exemplified in Thornton *v.* Court, cited *supra*, § 219. In Riddell *v.* Riddell, 7 Sim. 129, a testator covenanted before his death, for valuable consideration, to surrender certain copyhold land to the lord of the manor for the use of the purchaser, and covenanted with the latter that he should quietly enjoy, and that free from all incumbrance. The next day the surrender was made, and some months afterwards the purchaser resold, covenanting to surrender in similar manner. Dower having been claimed by the widow of the first vendor, it was referred to a master to inquire whether the testator had executed any indemnity against the claim of dower, and if so whether the indemnities were an existing charge capable of being enforced by any and what persons against the testator's estate ; and it was objected that the covenants for title of the latter were covenants in gross, by reason of not being annexed to any estate at the time they were made, and therefore incapable of passing to an assignee ; but the court held that even if this were so, yet equity would compel the covenantee to allow his name to be

§ 227. But as respects the covenant against incumbrances, a difficulty might be presented as to the pleadings. In declaring upon a breach of the covenants for seisin and of right to convey, it is sufficient to negative their words generally,[1] but in declaring upon a breach of the covenant against incumbrances it is necessary to set forth the particular manner in which the incumbrance has been the occasion of damage to the purchaser, and where, therefore, this damage has not been suffered by the plaintiff on the record, but by one claiming under him by assignment and to whose use the action is brought, it is conceived that it might be difficult to frame the declaration so as to come within the rule referred to.[2]

§ 228. As the right to sue in the name of the original covenantor is, moreover, a mere equity, the consequences of a release of a covenant for seisin by the original covenantee while still the owner of the land would seem to be more serious in their effect upon a subsequent purchaser from the latter than in the case of a covenant of warranty, whose benefit passes, if at all, as a strictly legal right and not as a mere equity. For the former covenant, being broken as soon as made, is at once a *chose in action*, and as such, even if transmissible at all to an assignee, must be taken by him subject to all the equities between the original parties; and it would, therefore, seem to follow that a release of a covenant for seisin made by the covenantee *bona fide* and for a valuable consideration, and before the covenantor has notice of the conveyance of the land, will protect the latter against all claiming under the covenantee, whether with or without notice of such release.[3] It is

used in an action to be brought by a purchaser from him. See also Murray *v.* Jayne, 8 Barb. S. C. (N. Y.) 612, cited *supra*, p. 212, n. 5.

[1] See *supra*, § 61.

[2] Thus in Thornton *v.* Court, cited *supra*, § 219, the plaintiff's counsel in arguing that his client had no remedy at law under the circumstances of the case urged that "in an action at law in the name of the mortgagee, the remedy would be inadequate; for in such action the mortgagee (the nominal plaintiff) could not allege in his declaration, and therefore could not prove, that he had sustained any costs in defending the action of ejectment, to which he was no party. But the plaintiff in this suit is entitled to such costs, and would have recovered them at law if he could have sued in his own name."

[3] Hence it was held in Proctor *v.* Thrall, 22 Verm. 262, that where a covenantee, by reason of having received a release from the holder of the paramount incumbrance, was thereby disabled from suing on the covenant against incumbrances, his assignee could have no greater rights, and hence that equity would not enforce an agreement by which, in consideration of such release, the releasor should succeed to the rights of the covenantee.

suggested, however, that upon general principles such would not be the case unless the release were for a valuable consideration,[1] nor if the covenantee had notice of the conveyance of the land.[2]

§ 229. Another consequence of holding the covenant for seisin to be broken as soon as made would seem to be, that after the lapse of twenty years from the execution of the deed, the common law presumption that the covenant had been satisfied or released would arise,[3] and if the covenant came within any local statutory enactment, of course it would be barred,[4] while with respect to such covenants as run with the land, the limitation would not begin to run until there had been an actual breach.[5]

§ 230. There is no room for the same conflict of authority as respects the right to take advantage of the covenant for further assurance as exists between the English and American cases

[1] Row *v.* Dawson, 3 Lead. Cas. in Equity, 376.

[2] These remarks would of course apply to any covenant released *after breach;* and the language of the court in Cunningham *v.* Knight, 1 Barb. S. C. (N. Y.) 405, would seem to agree with the position taken in the text. The defendant, in an action on a covenant of warranty given by him, offered as a witness a prior vendor who had also conveyed the land with a similar covenant, and to render him competent executed to him a release of the covenant, and the court in holding the witness competent said: "At the time of giving the release the defendant had a contingent right of action against the witness. If he should be evicted by the result of this suit, that right would become absolute, and would be forever discharged by this release. The covenant could never pass to any subsequent purchaser. If, however, the recovery should be in favor of the defendant in this suit, *then the witness would probably remain liable on his covenant to subsequent owners*, but that very liability would rather tend to interest him against the defendant, inasmuch as a recovery against the defendant, after the giving of the release, could not affect the witness injuriously, but would forever terminate his liability." In this case, apart from the probable fact that the release was not for value, it will be perceived that it was executed after the releasee had notice of the conveyance of the land by his releasor. So in Alexander *v.* Schreiber, 13 Mo. 271, it will be observed that when the release was given the covenantor had notice that his covenantee had parted with all his interest in the land, and the release itself was therefore so inoperative that it was not even mentioned in the opinion of the court.

[3] Stewart *v.* West, 14 Pa. 338, 339; Heath *v.* Whidden, 24 Me. 383; Jenkins *v.* Hopkins, 9 Pick. (Mass.) 544.

[4] Bird *v.* Smith, 3 Eng. (Ark.) 368; Durand *v.* Wilheim, 53 Ga. 76; Hyatt *v.* Mattingly, 68 Ind. 271; Webber *v.* Webber, 6 Greenl. (Me.) 138; Clark *v.* Swift, 3 Met. (Mass.) 390; Bronson *v.* Coffin, 108 Mass. 175; Rev. St. of Mass. c. 120, § 7; Matteson *v.* Vaughan, 38 Mich. 373; Bratton *v.* Gery, 12 S. Car. 42; Pierce *v.* Johnson, 4 Verm. 255; 11 Amer. Law Reg. 372; Dart on Vend. (5th ed.) 781; Spoor *v.* Green, L. R. 9 Exch. 99. In the recent case of Taylor *v.* Priest, 21 Mo. App. 685, it was held that though the covenant against incumbrances is broken as soon as made, the local statute of limitations does not begin to run until the actual payment of the incumbrance by the covenantee.

[5] Heath *v.* Whidden, *supra;* Stewart *v.* West, *supra;* Crisfield *v.* Storr, 36 Md. 152; 9 Jarm. Con. 402; Green *v.* Spoor, *supra.*

with regard to the covenant for seisin, for although it is sometimes said that the former covenant is broken by a demand and refusal to execute the deed of further assurance, yet it seems more proper to say that such a demand and refusal are necessary to the support of the action, but that the breach is a continuing one, even after that time, until the determinate damage has been suffered. In King *v.* Jones,[1] the court held that if the ultimate damage had been sustained by the ancestor, that is, if he had lost the estate for want of the further assurance, he alone, or his executor after his death, would have the right to sue, but that "the ultimate damage not having been sustained in the time of the ancestor, the action remained in the heir (who represents the ancestor in respect of land as the executor does in respect of personalty) in preference to the executor," and there seems to be no American case which has denied to an assignee of the land the benefit of a covenant for further assurance, even although the refusal may have been made before the assignment. But as the remedy under the covenant is usually sought in a court of equity, it is probable that no difficulty would arise upon this point.

§ 231. The covenant of non-claim has already been noticed in a previous chapter.[2] It was there seen that no distinction has as a general rule been taken between that covenant and a covenant of warranty. In Maine,[3] however, the application of the rule that this covenant runs with the land to an assignee, combined with the operation of the doctrine of estoppel as enforced in some of our States, would have produced a decision so apparently opposed to legal principle that it was deemed necessary to deny to an assignee the benefit of the covenant of non-claim, and previous decisions[4] opposed to such a conclusion were therefore overruled, and the law as thus held has been recognized by the later authorities in that State.[5]

§ 232. It has been already said that covenants which run with the land do not pass by direct operation of assignment, but as annexed and incident to the land to which they relate, and the argu-

[1] 5 Taunt. 418, *supra*, § 206, n. 2.

[2] *Supra*, § 22.

[3] Pike *v.* Galvin, 29 Me. 187. The dissenting opinion of Wells, J., is reported in 30 id. 539.

[4] Fairbanks *v.* Williamson, 7 Greenl. 99; White *v.* Erskine, 1 Fairf. 306.

Partridge *v.* Patten, 33 Me. 483; Loomis *v.* Pingree, 43 id. 314; Harriman *v.* Gray, 49 id. 538. See these cases more particularly considered in the next chapter.

ment constantly used in the cases cited in a former part of this chapter[1] to prove the incapacity of the covenant for seisin for running with the land has been, that if no land passes to the assignee, the covenant, which only passes as an incident to the land, must alike fail of assignment. Whatever force this argument may have as applied to the covenant for seisin, it has equal force as applied to the covenants for quiet enjoyment and of warranty, and would logically lead to the alarming consequence that when a purchaser, by reason of the total loss of the land, most needed the help of his covenants for title, he would be utterly deprived of their aid.

The leading authority for such a curious result is the early case of Noke *v.* Awder,[2] in which John King had made a lease for years to Awder, the defendant, who conveyed it to one Abel, and covenanted that he and his assigns should peaceably enjoy it without interruption. From Abel the lease came by assignment to the plaintiff, who, being ousted by one Robert King, brought an action upon the covenant. The case was on the point of being adjudged for the plaintiff, when Coke, who was counsel for the defendant, raised this dilemma: in order to entitle the plaintiff to recover, he must show that he was ousted by a lawful and paramount title, it being well settled that the covenant is not broken by a mere tortious entry of a stranger;[3] and if he show the eviction to be under paramount title, then nothing passed from the covenantor but a lease by estoppel, and as no estate passed, the subsequent assignee, who took nothing, of course lost the benefit of the covenant, which could pass only as an incident of the estate. This argument was successful, and the judgment for the plaintiff was arrested.

Although within a century and a half after this decision had been pronounced, it was denied that it went to the extent of deciding that covenant never lay by the assignee upon the assignment of an estate by estoppel,[4] yet in more modern cases the doctrine has been recognized and applied.[5]

[1] *Supra*, § 204 *et seq.*

[2] Cro. Eliz. 373, 417, 436. A full account of the case will be found on pp. 362–364 of the fourth edition of this treatise.

[3] *Supra*, § 127.

[4] By Lord Raymond, in Palmer *v.* Ekins, 2 Raym. 1550, "In truth, the case in Croke was adjudged for the defendant because no breach appeared in the declaration."

[5] Thus in Andrew *v.* Pearce, 4 Bos. & Pull. 162, a tenant in tail made a lease for ninety-nine years, with a covenant for quiet enjoyment. After his death, the

Nor was it possible to meet the difficulty by the suggestion that the covenantor is estopped from saying that no estate passed by his deed, for it will be remembered that the plaintiff must in his declaration for a breach of the covenants for quiet enjoyment or of warranty aver the eviction to have been caused by one lawfully claiming under paramount title, and cannot therefore contradict his own averment in order to avail himself of the defendant's estoppel.[1]

lessee, being still in possession, assigned the lease to the plaintiff, who, being evicted by the party entitled to the estate after the death of the tenant in tail, brought his action on the covenant against the executor of the original lessor; and the Court of Common Pleas held that the lease having become absolutely void by the death of the tenant in tail, its assignment by the lessee to the plaintiff had no operation whatever. "He could neither assign the lease," said Mansfield, C. J., "nor any interest under it, because the lease was gone. What right of any sort had the assignee? If anything, it could only be a right of action on the covenant, and that could not be assigned by law. As the person who made the assignment had no interest in the premises, the assignment itself could have no operation. Consequently, there is no ground upon which the present action can be maintained." See also Whitton *v.* Peacock, 2 Bing. N. C. 411 (and its explanation in Gouldsworth *v.* Knights, 11 Mees. & Welsb. 343); Green *v.* James, 6 Mees. & Welsb. 656; Pargeter *v.* Harris, 7 Q. B. 708. The distinction between Andrew *v.* Pearce, and the case of Williams *v.* Burrell, 1 Com. Bench, 402, is that in the former the decision was expressly put upon the ground that the lease had become absolutely void by the death of the lessor *before* the assignment to the plaintiff; in the latter, the estate of the assignee did not become void until *after* the assignment, and consequently there was a chattel interest which passed to the assignee, and which was sufficient to support the covenant. Lewis *v.* Campbell, 8 Taunt. 715.

[1] The remarks of Judge Hare upon the practical application of such a doctrine at the present day are eminently correct. "No inconvenience," says he, in the note to Spencer's case, 1 Sm. Lead. Cas. (8th Am. ed.) 201, "could arise from it under the old common law, except in the case of terms for years, where we have seen its effects in defeating a recovery in Noke *v.* Awder. But it did not apply where freeholds were in question; for, as they were conveyed by livery of seisin, an actual estate was transferred by right or wrong to the feoffee in all cases, and might pass from him to any subsequent assignee. Thus when a feoffment was made, although the feoffor might have previously had nothing in the land, the feoffee took an estate of freehold, which was susceptible of being transferred by livery, and carrying with it all warranties and covenants made by the original feoffor. But in conveyances taking effect under the statute of Uses, as must all those which are intended to pass an estate of freehold and are unaccompanied by livery of seisin, nothing passes to the vendee save only the estate actually and legally possessed by the vendor. Of course, therefore, in the very case in which the title to the estate totally fails, and where the purchaser who has taken it on the security of the covenants for title entered into by a previous vendor stands most in need of the indemnity which it is their professed object to secure, he is left, under the operation of the doctrine of Noke *v.* Awder as applied to our modern system of conveyancing, wholly without remedy." And such indeed was the decision in North Carolina in Nesbit *v.* Montgomery, 1 Taylor, 86, a full account of which will be found on pp. 365, 366, of the fourth edition of this treatise.

In Allen *v.* Wooley, 1 Blackf. (Ind.) 149, one leased a fulling-mill for a year,

§ 233. But inasmuch as all law "in reality tends to maintain right and justice, and the enforcement of the contracts which men enter into with each other," [1] it is not surprising to find that in America a large class of cases has turned aside from the logical consequence of that decision, while more recently in England the decision itself has been subjected to criticism resulting in its being practically overruled.

In the case in New York of Beddoe *v.* Wadsworth,[2] decided in 1839, it was, after much consideration, determined that if the grantor were in full possession of the premises under claim of title, and by his deed transferred that possession to his grantee, the latter took a sufficient estate to carry with it the benefit of those covenants for title which run with the land. No case in that State, it was said, had been produced "which denies that

covenanting for quiet enjoyment, and the lessee covenanting to pay the rent and to keep it in repair, and on the same day the lessee assigned the lease to the plaintiff, who brought suit against the lessee for not repairing, and it was held that if the lessor had assigned *the reversion*, the covenants would have passed with it to the assignee, but as he only assigned the lease itself, there was no land to which the covenants could be attached. And in Beardsley *v.* Knight, 4 Verm. 471, it was held that in order to give to an assignee the right of suit on the covenants in the deed to his assignor, the conveyance by the latter must be sufficient to pass the legal title, and that the covenants would not pass if the deed, by reason of containing a scroll instead of a seal, was insufficient for that purpose.

Notwithstanding some expressions in Randolph *v.* Kinzey, 3 Rand. (Va.) 396, the case itself must not be deemed to be an authority against the exercise of equitable jurisdiction under such circumstances. The bill was filed by a *covenantor* against his covenantee and the heirs of a prior covenantor, as a bill of peace and *quia timet*, and was dismissed by the court because no grounds had been laid for relief under either head. The fact, also, of there having been an "adverse possession" seems to have been to some extent relied on by the court, who observed: "A disseisor may convey and warrant the land, for there may be a fee simple in a disseisin. But a person against whom there is an adversary possession cannot make a warranty which will pass to an assignee, because he cannot convey." In Dickinson *v.* Hoomes, 8 Gratt. (Va.) 353–441, the court seemed to be of opinion (p. 403) that it was not necessary that any estate should pass from the covenantor to the covenantee in order that the covenant should pass to an assignee. The case was one of a devise to six children, and should any die without issue living at his death, his estate should be divided equally among the survivors. One of these devisees conveyed to a purchaser, the others joining in a covenant in the deed to warrant and defend the land against themselves, as contingent devisees under their father's will, and all claiming under them. The purchaser resold the land to one against whom the children of one of these devisees recovered an undivided share under proceedings in partition (1 Grat. 302), and it was held that the covenant of their father would pass to the second purchaser, so as to entitle him to an injunction restraining them from proceeding with their partition. See also the case of Martin *v.* Gordon, 24 Ga. 536, noticed *infra*, p. 345, n. 4.

[1] Per Martin, B., in Cuthbertson *v.* Irving, 4 Hurl. & Norm. (Exch.) 758. See *infra*, p. 349, n. 2.

[2] 21 Wend. (N. Y.) 120.

these covenants pass where the *possession* merely goes from one to another by deed and there is afterwards a total failure of title; but there are several to the contrary.[1] Nor when we take the word *estate* in its most comprehensive meaning can it be said there is none, in such a case, to which the covenant may attach. It is said by Blackstone to signify the condition or circumstance in which the owner stands with respect to his property;[2] and a mere naked possession is an imperfect degree of title, which may ripen into a fee by neglect of the real owner. It is, in short, an inchoate ownership or *estate*, with which the covenants run, to secure it against a title paramount, and in that sense is assignable within the restriction insisted upon. It is said in several cases, that the covenants of warranty and quiet enjoyment refer emphatically to the *possession*, and not to the *title*.[3] The meaning is that however defective the title may be, these covenants are not broken till the possession is disturbed. When the latter event transpires, an action lies to recover damages for the failure, both of possession and title, according to the extent of such failure."

In Massachusetts, the case of Slater *v.* Rawson[4] was decided at about the same time as Beddoe *v.* Wadsworth. A conveyance had been made with covenants of good right to convey and of warranty to one under whom the plaintiffs claimed as assignees through several mesne conveyances. They yielded to an ouster under title paramount, which they clearly showed, but failed in an action against the original covenantor to prove any actual occupancy or seisin of the land by him at the time of his entering into the covenants. On this ground the verdict for the plaintiffs was set aside and a new trial ordered. "To support an action by an assignee on the covenant of warranty," said the court, "it is necessary that the warrantor should have been seised of the land; for by a conveyance without such seisin the grantee acquires no estate and has no power to transfer to a subsequent purchaser the

[1] Those cited by the learned judge were Withy *v.* Mumford, 5 Cow. (N. Y.) 137; Garlock *v.* Closs, id. 143; Markland *v.* Crump, 1 Dev. & Batt. (N. C.) 94; Booth *v.* Starr, 1 Conn. 244, 248. These cases however do not decide this, unless incidentally. Their point is that an intermediate vendor cannot, in respect of his liability upon the covenant which he himself has given, recover of a prior vendor without first making good the damages of the party evicted. See *supra*, § 215.

[2] 2 Black. Com. 103.

[3] Waldron *v.* McCarty, 3 Johns. (N. Y.) 471, per Spencer, J.; Kortz *v.* Carpenter, 5 id. 120.

[4] 1 Met. (Mass.) 450; 6 id. 439.

covenants in his deed, because, as no estate passes, there is no land to which the covenants can attach. If, therefore, the defendant at the time of the making of his deed was not seised, then the covenant of warranty did not pass to the plaintiffs as assignees, and the only liability of the defendant is upon his covenant of seisin, which covenant, for the reasons already stated,[1] is wholly unavailable to the plaintiffs." On a subsequent trial, however,[2] the plaintiffs gave evidence that both the covenantor and his father had exercised acts of ownership over the property, had claimed it as their own, been upon it, cut timber, etc. Although at Nisi Prius the court seemed to be of opinion that these acts, being mere acts of trespass upon unenclosed wild land, would not operate as a disseisin of the true owner, yet a verdict was taken for the plaintiffs, and upon a motion for a new trial the Supreme Court held that whatever might be the distinction between disseisin and dispossession, there was, according to modern authority, no legal difference between seisin and possession, nor was it necessary, it was said, to decide this question, "for if the defendant was in possession when he conveyed, claiming to hold the whole land conveyed, he had a good right to convey his title, whatever it was.[3] His estate passed by his deed to the grantees, and all his covenants were binding." And upon the familiar doctrine that although an actual possession may not amount to a disseisin as against the lawful owner, yet it will be good as against a mere stranger, it was held that "the defendant had acquired, by possession and occupation, a legal though not an indefeasible title to the land in question. He was lawfully seised and possessed of it against all the world, the lawful owner only excepted. His title, therefore, by his grant passed to his grantees, and from them and intermediate conveyances to the plaintiffs, with the covenant of warranty annexed, and for the breach of that covenant the plaintiffs are well entitled to damages," and judgment was therefore entered upon the verdict.[4]

[1] That is, because the plaintiffs sued as assignees of the original covenantee.

[2] Slater *v.* Rawson, 6 Met. (Mass.) 439.

[3] This doctrine, which is almost peculiar to some of the New England States, was attempted to be explained, *supra*, § 42 *et seq.*

[4] The decision in New York of Fowler *v.* Poling, 2 Barb. S. C. (N. Y.) 306, professed to follow that of Beddoe *v.* Wadsworth, but virtually did not. The case was, however, overruled on appeal, 6 Barb. S. C. 166, and the cases cited in the text approved, as they were also in Dickinson *v.* Hoomes, 8 Grat. (Va.) 399, and in Lewis *v.* Cook, 13 Ired. L. (N. C.) 194. In this last case, the court, after referring to the

In Maine[1] and Missouri,[2] moreover, this doctrine has been approved and followed, and from the course of decision in Ohio heretofore noticed,[3] it must, it would seem, be taken to be the law in that State. In a somewhat recent case in the Federal

facts (which have been cited, *supra*, p. 329, n. 3, in connection with another part of this subject), said: "The defendant's counsel laid down the position that a warranty, being a covenant annexed to an estate, could not continue longer than the estate. . . . We admit the position that the warranty is gone whenever the estate to which it is annexed *determines;* for it is a mere incident of the estate, and the incident cannot continue longer than the principal; as if there be an estate to A. for life, with warranty to him and his heirs and assigns, at the death of A. his estate determines, and the warranty is at an end. This case is put by Coke, and the principle is contained in all the books. The error of the defendant's counsel is in reference to the meaning and application of the principle. When does an estate determine? When it is 'spent,' — expires by '*the terms of its own limitations.*' If there is an eviction by title paramount, the estate is, in one sense, at an end, but has not *determined*, so as to deprive the party of the benefit of his warranty; for if so, a warranty would never be of any force or effect. Until the eviction, the party has no use for it, and after that it is gone. This proposition certainly cannot be maintained." See also the dissenting opinion of Pearson, J., in Spruill *v.* Leary, 13 Ired. L.(N. C.) 408; *infra*, Ch. XI. In Martin *v.* Gordon, 24 Ga. 536, Benning, J., after quoting in full the case of Noke *v.* Awder, said: "This case has been repeatedly followed by the English courts down to this day. It has not been followed by the courts of New York, or those of Massachusetts, or those of some of the other States of the United States, but those courts, if one may judge from the face of their decisions, seem rather to make the law yield to the case, than the case to the law. The power to do this is not given to any court of this State. The English cases, I think, speak the law of Georgia." The decision, however, sustained the right of the assignee to recover on the covenant of warranty, but approved the admission of evidence to show that the real consideration paid to the original covenantor was much less than that mentioned in the deed; Lumpkin, J., in the opinion delivered by him considering that "the result of a careful examination of the authorities established that subsequent purchasers were affected by the equities between previous parties." See, however, as to this, *supra*, § 222.

[1] Wilson *v.* Widenham, 51 Me. 566.

[2] Dickson *v.* Desire, 23 Mo. 151. "Although the conventional warranty of the common law," said Leonard, J., in the first of these cases, "was considered so entirely an accessory obligation that it could subsist only as an incident to some estate in the land, this produced no inconvenience in the ancient system of conveyancing by feoffment and other similar assurances, which, operating upon *the possession*, created by their own force estates *de facto* (tortious estates as they were called) sufficient to support the warranty and carry it along with the land to all the subsequent successors. In the process of time, however, other modes of transfer were introduced under the statute of Uses, which operated upon the right only, and the personal covenants of title superseded in English conveyancing the ancient warranty of the common law, which, yielding a recovery in money instead of land, were for that reason deemed personal covenants. . . . The general doctrine of the old law as to the real warranty that where no estate passes to which the warranty can be annexed the benefit of it does not pass to a subsequent assignee, admitting it to be applicable to the modern covenants for title, is obviated in cases like the present by the American decisions, that a conveyance by a grantor in possession under a claim of title passes an estate to the grantee sufficient to carry the covenants to any subsequent assignee."

[3] See *supra*, p. 312, n. 3.

Court of Oregon, the doctrine of this class of cases was considered to reach to the extent of deciding that whenever possession had gone with the deed there was a sufficient estate to carry the benefit of the covenants to an assignee.[1]

An Illinois case in 1870 went still further.[2] The defendants, having conveyed land of which they were not in possession, with a covenant of warranty against all patent titles, were held liable upon their covenant in an action brought by the evicted assignee of their grantee. It was contended on behalf of the defendants, that as they were not in possession the plaintiff could not maintain the action, and the authority of the first decision in Slater *v.* Rawson was strongly relied on; but the court declined to follow the doctrine of that case, and even thought it illogical to hold, as in the second decision, that a tortious possession by the covenantor sufficed to attach the covenants to the land, and not to hold that the same result followed when the grantee took possession of land which had previously been vacant.[3]

[1] Fields *v.* Squires, 1 Deady, (C. C. U. S.) 366, 389. "It is also objected," said Deady, J., "that the defendant is not liable on this covenant to the assignee of the covenantee, because it does not run with the land. The reason given for this position is that no estate passed to the assignee by the deed, the grantors not having any interest in the land at the time. This was the doctrine of the common law as to conveyances of estates less than freehold, which passed without livery of seisin. Noke *v.* Awder, Cro. Eliz. 417. And as under our modern system of conveyancing, freeholds pass without livery of seisin, it was held at one time that the doctrine became applicable to conveyances of such estates, and in case the grantor had no interest in the land, the assignee of his grantee could not sue upon the covenants, because they only passed as an incident of the estate. But this doctrine has been modified substantially, so that it may be said that whenever possession is taken under the deed, there is sufficient estate to carry the covenants to the assignee. Beddoe *v.* Wadsworth, 21 Wend. 123; Slater *v.* Rawson, 6 Met. 439; Rawle on Covenants, 382 *et seq.* This doctrine is peculiarly adapted to the early circumstances of this country. For years before the passage of the Donation Act, the right of the settlers upon the land was a mere possession, with an expectation of future title from the United States. Under these circumstances, in all the towns, this possession was conveyed and reconveyed with covenants for the title expected, and it is proper and safe to hold with these authorities that a sufficient estate passed to carry the covenants to the subsequent occupants and assignees."

[2] Wead *v.* Larkin, 54 Ill. 489. The facts of this case will be found in Harding *v.* Larkin, 41 id. 413, and Wead *v.* Larkin, 49 id. 99.

[3] *Supra*, p. 344. The court said: "If the question of possession is at all important in reference to the passing of this covenant to an assignee, it is not the possession of the covenantor that is material, but that of the covenantee when he makes his conveyance. Then is the first time that the covenant passes as attached to the estate. When first made, it is made to the covenantee directly and in person, and he takes its benefit by virtue of his contract, and not as incident to the estate. It can certainly

§ 234. The reasons which, from convenience, may support these cases will readily appear when we consider that it could hardly be considered as settled by that class of cases of which Noke *v.* Awder was at the head what exact amount of interest was sufficient to carry with it covenants for title to an assignee;[1] in other words, how small the estate might be which, passing to an assignee, would vest in him the benefit of these covenants;[2] and there was reason for every liberal construction which could be reasonably adopted in order to avoid the consequences, at the present day, of the technical doctrine of these cases. This doctrine, at the period when freeholds were conveyed by feoffment with livery worked no evil, as has been said, except with respect to leases. But it is now far different, and when a conveyance passes no greater estate than the grantor himself had, it seems the height of hardship to deny to a subsequent assignee the benefit of that grantor's covenants, because no legal title to the land had passed with which those covenants could run. For then the more those covenants are falsified, the better the position of the

never be held that if he takes possession and is evicted by paramount title he cannot recover because the land was vacant when the deed was made to him. Even then, if we concede that he must take possession before he can pass the covenant to his grantee, as attached to the land, we are wholly unable to see why it does not pass if he has taken possession, or what the possession or non-possession of the covenantor, when the covenant was made, has to do with its passing to the grantee of the covenantee." And the court also inclined to the opinion that each grantor was estopped by his deed from denying that he had an estate to which the covenants would relate.

It is to be observed that the Illinois statute of conveyances, § 4, making the transfer of interests in land by parties not in possession as effectual (for the purpose of the interests conveyed) as if they were in possession, was strongly relied on by the appellees, and that while the court did not refer to this statute, its existence cannot have been without effect in bringing about the conclusion "that where the covenantee takes possession and conveys, the covenant of warranty in the deed to him will pass to his grantee, although the covenantor may not have been in possession at the time of his conveyance."

In Vancourt *v.* Moore, 26 Mo. 92, cited by the appellees in Wead *v.* Larkin, it was stated *obiter* that the similar Missouri statute "does away with the rule of the common law which required a grantor of land to be seised thereof when he makes his deed of conveyance, in order that his covenant of warranty may attach to or run with the land."

[1] Thus, in Dickinson *v.* Hoomes, 8 Grat. (Va.) 374 (cited *supra*, p. 342, n. 1), it was argued for the plaintiff that the contingent interest of one of several covenantors dependent upon another of them dying without issue was a sufficient estate to carry the covenant to an assignee, and the court went even further, and seemed to be of opinion that it was not necessary that any estate should pass from the covenantor.

[2] See note to Spencer's case, 1 Smith's Leading Cases.

covenantor; and when *no* estate has passed from him, he is protected on this very ground.

§ 235. When, therefore, a grantee has received by virtue of his deed a possession under color of title, which if it endure for the length of time required by the limitation acts will be valid as against all the world, and which possesses all the qualities of an estate as respects capability of passing by assignment, descent, or devise, it can scarcely be thought inconsistent with principle to hold that such a possession is sufficient to convey to subsequent assignees the benefit of the covenants for title of the original grantor.

§ 236. But it would seem to be no longer necessary to resort to expedients in order to escape from the logical results of the decision in Noke *v.* Awder. The later English authorities have subjected it to a severe examination, and it is now considered that the case decided, not that when no estate passed there was nothing with which the covenants for title could run, nor that covenant never lay by the assignee upon the assignment,[1] but merely that as the plaintiff *by his own showing* never had conveyed to him any estate in the premises, he could not sue upon the covenant as one running with the land; in other words, that the case depended entirely upon a question of pleading, viz. the insufficiency of the breach.[2] It is certainly matter of regret that this

[1] A question which, it is considered, did not arise, and was not necessary for the decision of the case. See Palmer *v.* Ekins, 2 Raym. 1550.

[2] Cuthbertson *v.* Irving, 4 Hurl. & Norm. 755, 1 Smith's Lead. Cas. *136. In the notes by the English editor of the latter to the edition of 1866 (omitted in the later editions because perhaps rendered unnecessary) it was said, "In Noke *v.* Awder the plaintiff (to follow the argument of Coke, Attorney-General, for the defendant) was in this dilemma, that either the lessor John King had, upon the plaintiff's showing, no estate, and then no term was created by the lease, and so no estate passed by the assignment from the defendant to Abel, consequently there was no actual privity of estate between the defendant and the plaintiff, nor any estoppel, because the facts were stated on the record, and the estoppel not relied upon; or, supposing that the declarations were read as alleging a valid lease from John King to the defendant, then, consistently with the declaration, Thomas King, who was alleged to have ousted the plaintiff, had no title, was a mere trespasser, and so there was no breach of the general covenant for quiet enjoyment. So that, *quacunque via data*, the action could not be maintained. And the court are reported to have held 'that it was clear upon the matter shown that the action lay not, for the plaintiff ought to have shown an estate by descent in John King at the time of the lease and the assignment made, or an estate whereby he might make a lease, and that this was afterwards determined; and so confess the estate in the lessor, otherwise this action of covenant lieth not, and it never lies upon the assignment of an estate by estoppel. Wherefore they were of opinion to have then given judg-

result should not have been sooner worked out, and that that which was a mere professional triumph of Sir Edward Coke upon a question of pleading should have disturbed the courts of last resort upon both sides of the Atlantic for more than a century.

ment against the plaintiff, but afterwards they would advise until the next term.' If the judgment of the court had finally proceeded upon this reasoning, it would only have been a decision that as the plaintiff, *upon his own showing*, never had conveyed to him any estate in the premises, he could not sue upon the covenant as one running with the land. The estoppel was not pleaded, but the contrary; and the *placitum* in Comyn's Digest, Covenant (B 3), 'So the assignee of a lease which *appears* to be good *only* by estoppel shall not have covenant, R. Cro. El. 437, Mo. 419, correctly limits the *obiter* opinion of the court (which did not form the basis of their final decision) to cases where it *appears* that no estate passed to the covenantee.' The ultimate decision in Noke *v.* Awder was founded upon the insufficiency of the breach, assuming the lease to have been valid in *interest* and not merely by estoppel, for the report proceeds, 'Note: This was continued until Trin. 41 Eliz., and then being moved again, all the justices resolved that the assignee of a lease by estoppel shall not take advantage of any covenant, *but that it shall not be intended a lease by estoppel, but a lawful lease.* But no sufficient title being shown to avoid it, it is then as an entry by a stranger without title, which is not any breach. Wherefore it was adjudged for the defendant.' Noke *v.* Awder cannot therefore be considered as establishing the general proposition, that the benefit of covenants in a lease which operates by estoppel does not run with the reversion; or that it is competent for the lessee or his assignee to raise the point against the assignee of the lessor."

CHAPTER XI.

THE OPERATION OF COVENANTS FOR TITLE BY WAY OF ESTOPPEL OR REBUTTER.[1]

§ 237. The operation of the ancient warranty by way of rebutter was far more effective in every-day use than the remedy it afforded by means of voucher or a *warrantia chartæ*, and upon the effect of this rebutter in its descent upon heirs the doctrines of lineal and collateral warranty depended. In a former chapter,[2] an attempt has been made to sketch the origin of collateral warranty and to refer to the successive restrictions which Parliament imposed upon it, "until its effect and operation were reduced to so narrow a compass as to become in most respects a matter of speculation rather than of use."[3]

§ 238. The obligation of the heir to render to the evicted vassal or donee of his ancestor an estate equal in value to that which the latter had lost, depended upon the condition that he had other sufficient lands by descent from the warranting ancestor.[4] "But, though without assets, he was not bound to insure the title of *another*, yet in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself;* for if he could succeed in such claim, he would then gain assets by descent (if he had not them before), and must fulfil the warranty of his ancestor; and the same rule was, with

[1] The subject of this chapter is treated with accurate learning and his wonted ability in Judge Hare's note to the Duchess of Kingston's case, 2 Smith's Leading Cases, of which the first edition was published in 1844. The first edition of the present treatise was published in 1852, and the writer owes to the note in question much of what he then endeavored to present upon the subject. Since then, the first edition of Bigelow on Estoppel was published in 1872, and the subject there received able and elaborate consideration. All these works have since gone through several editions, but the views of the respective authors have remained comparatively unchanged, except that in the present edition of this treatise the writer has endeavored to show that most of the doctrine is equitable and not legal, having no necessary connection with either the law of covenants for title or the law of estoppel.

[2] See *supra*, Ch. I.

[3] Butler's note to Co. Litt. 365 *a*; see also his note to p. 373.

[4] Co. Litt. 374 *b*.

less justice, adopted also in respect of collateral warranty, which likewise (though no assets descended) barred the heir of the warrantor from claiming the land by any collateral title, upon the presumption of law that he might thereafter have assets by descent either from or through the same ancestor." [1]

To prevent the injustice, however, which would flow from the warranty of a tenant by the curtesy barring the children of the marriage after their father's death, the statute of Gloucester [2] provided that "if a man alien a tenement that he holdeth by the law of England, his son shall not be barred by the deed of his father (from whom no heritage to him descended) to demand and recover, by writ of *mort d'ancestor*, of the seisin of his mother, although the deed of his father doth mention that he and his heirs be bound to warrant." [3]

[1] 2 Black. Comm. 302, and see *supra*, § 5 *et seq.*

[2] 6 Edw. I. c. 3.

[3] In Todd *v.* Todd, 18 B. Mon. (Ky.) 144 (*supra*, § 5), a husband, seised in right of his wife, joined with her in the conveyance of her land by a deed which contained a covenant of warranty, but which by reason of defective acknowledgment was inoperative to pass her estate. After her death the husband married again, and died intestate; there were children of the second marriage, and his estate descended equally to both sets of children. The children of the first marriage brought suit against the personal representative of their father for payment, out of the whole of his estate, of the loss which his breach of warranty had caused to fall upon them alone. In answer to this it was urged that the covenant of warranty had not been broken, and consequently no charge upon the estate had been created; that there was no example in any of the books for such an action, although occasion for it must frequently have arisen, especially between the heir and the executor. But the court said, "It is true that there has been no actual breach of the warranty, because it has been satisfied and a breach prevented by operation of law by the application of the assets in the hands of the heirs in satisfaction of the covenant of their ancestor. . . . And as they have discharged a liability which was by law a charge upon the whole estate, they have a right to have it thus applied, so that the loss will devolve equally upon all the heirs. With respect to the argument drawn from the absence in the books of any analogous cases, it is only necessary to remark that the doctrine of the common law on the subject of warranty and of descents was of such a character as to prevent cases like the present from arising; and in nearly all the other States of the Union the ancestor's warranty, in cases like this one, does not have the effect of precluding a recovery of the land by the heirs of his wife, and consequently no such question as the one here presented can arise in those States."

The General Statutes of Kentucky, 1881 (c. 63, p. 584, § 4), provide that "no judgment of eviction suffered by a husband, or conveyance made by him of the inheritance or freehold of his wife, or other act done by him, shall operate as a discontinuance, or shall prejudice or impair her right of action, or the right of entry of her or her heirs, or such as have right after her death," and also (§ 18) that if the deed of such grantor warrant the estate purporting to be conveyed against him and his heirs, and any estate, real or personal, shall descend to the claimant, or come to him by devise or distribution, on the side of the grantor, then he shall be barred for the value of the

The statute of 11 Hen. VII. c. 20, invalidated all warranties made by a tenant in dower, a tenant for life, or in tail jointly with her husband of lands derived from his ancestors, made either by herself while a widow, or with any after-taken husband; the statute of 4 Anne, c. 16, § 21,[1] declared that all warranties made by any tenant for life of any lands coming to any person in

estate that shall so descend or come to him by descent, devise, or distribution.

In Lane *v.* Berry, 2 Duvall, (Ky.) 282, a tenant by the curtesy conveyed with general warranty, and the children of the marriage having brought ejectment it was held that having inherited other lands from their father they were estopped by their covenant, and this was affirmed on appeal. "There is no conflict," said the court, "between these two legislative enactments. The first saves the right of the wife and her heirs from defeasance by the unauthorized conveyance of the fee simple title by the husband, and secures to them the right of entry at his death. But the second, nevertheless, bars the right of entry by her heirs if they have received from the vendor an equivalent estate. . . . So far as her heirs are concerned the vendor's conveyance does not divest them of their title, unless they inherited some compensatory estate from him, when, to that extent, the title passes by estoppel." And so in Proctor *v.* Smith, 8 Bush, (Ky.) 81, where a woman and her three children were tenants in common of certain land, and she, after conveying the whole with warranty, died devising her entire property to one of the three, the court held that the two children who had received no assets from her could recover their respective shares, but that under the eighteenth section of the statute the third child was barred unless the estate devised was wholly or partially absorbed by the testatrix's debts.

A comparison between this case and Jones *v.* Franklin, 30 Ark. 631, shows clearly the effect of this statute. The facts were substantially the same, but as there was no such statute in Arkansas, the court held that even the child receiving assets was not barred, for, it said, "In this case the land which is the subject of the action did not descend to the appellant from the warranting ancestor, but she claimed under the will of her grandfather; hence the covenant in the hands of the appellee did not bar her title by way of rebutter."

The seventeenth section of the Kentucky statute was not directly referred to by the court in Lane *v.* Berry, *supra*. It provided that "a deed and warranty of land purporting to pass or assure a greater right or estate than the person can lawfully pass or assure, shall operate to convey or warrant so much of the right and estate as such person can lawfully convey, but shall not pass or bar the residue of the right or estate purporting to be conveyed or assured."

The practical effect of the statute (which was a re-enactment of previous legislation) would therefore seem to be, —

1. Under the fourth section, a conveyance by a tenant by the curtesy without warranty, will not bar the heirs of the wife.

2. Under the seventeenth section, a conveyance with warranty of a larger estate than the grantor has, will not bar those in remainder or reversion without assets; but, —

3. Under the eighteenth section, if assets descend or come to the latter, they are barred to the extent of their value.

In Chauvin *v.* Wagner, 18 Mo. 553, a husband and wife, seised in her right, conveyed the land with a covenant for further assurance. By reason of its defective acknowledgment the deed did not pass the wife's estate, and it was obviously held that the children were not estopped by their father's covenant, unless it were shown that they had assets by descent from him of equal value.

[1] Entitled, "For the amendment of the law, and the better advancement of justice."

reversion or remainder should be void, and that all collateral warranties of any lands by any ancestor who had no estate of inheritance in possession in the same should be void as against his heir; and finally, by the act of 3 & 4 Will. IV. c. 37 and 74, lineal and collateral warranties have been entirely abolished.[1]

§ 239. While in some of our States this doctrine of rebutter, which sprang from the common law warranty, has been applied to the modern covenants for title, producing results often incongruous, and at times of greater or less hardship,[2] yet in other

[1] As they have been in many of the United States. See *infra*, Ch. XII.

[2] In the old case in Massachusetts of Banister *v.* Henderson, Quincy, 119 (A. D. 1765), it was argued that an estate tail, with cross remainder in tail, could be barred by collateral warranty, but the point was afterwards abandoned, though the editor of the reports seems to think that it was well taken.

In Pennsylvania, although the report of the judges in 1808 (3 Binn. 625) considered that the first thirteen and the twentieth and twenty-seventh sections of the statute of Anne were in force in that State, yet the twenty-first section was not so considered; and in the year 1799, where, in Eshelman's Lessee *v.* Hoke, 2 Yeates, 509, a tenant by the curtesy, in fulfilment of articles entered into in the lifetime of his wife, conveyed his interest to his eldest son, who conveyed to the purchaser with a covenant of warranty against himself and his brothers and sisters, and the father also gave a covenant indorsed on the deed against himself and his heirs, who afterwards brought an ejectment for their share, it was held that the latter were barred by the collateral warranty of their father, as the statute of Anne had never been considered as in force in Pennsylvania. (The reason why this case did not come within the statute of Gloucester was because real assets had descended to the heirs from the father.) In the subsequent case of Jourdan *v.* Jourdan, 9 Serg. & Rawle, 268, it was also held that a collateral warranty barred the heirs of the warrantor; but, apparently to escape from the hardship of the decision, it was also determined that such warranty descended only upon the eldest son, as heir at common law, and hence did not rebut his brothers and sisters. In a note, however, to the case of Paxson *v.* Lefferts, 3 Rawle, (Pa.) 67, (quoted in part *supra*, p. 148, n. 2, and cited with approval in the recent case of Carson *v.* Cemetery Co., 104 Pa. 575, *infra*,) it was said: "In this country, where descents are partible, great inconvenience and injustice would ensue from applying the rule that a warranty bound only the heir at common law in the operation of a warranty by way of rebutter. The analogy between the custom of gavelkind and our system of descents affords an exception which we cannot but adopt. It is true that the text of Littleton is express, that a warranty of lands held in gavelkind descends only to the heir at common law, and shall not bind 'the heirs that are heirs according to the custom.' Litt. § 736. The same rule applies to land held in borough English. Id. § 735. In the latter instance the case as put by Littleton appears extremely hard on the purchaser. The youngest son of the tenant in tail, who discontinued with warranty, was not barred, although land to an equal or greater amount in value had descended to him from his father. But the subtle notion of the descent of the warranty on the heir at common law alone, productive of such injurious effects, was got rid of by an ingenious contrivance for the promotion of justice. Although the customary heir was not considered directly liable on the warranty, yet he was held so by reason of the inheritance; see Coke on Litt. 376 *a*; and either by being directly vouched by the warrantee, or by being vouched by the heir at common law, in case the latter alone had been vouched (either of which

States the English statutes have been declared to be in force;[1] in others, they have been re-enacted either literally or in sub-

courses was at the election of the warrantee), the customary heir could be rendered liable. See Robinson on Gavelkind, 127; 1 Leon. 112; Cro. Jac. 218; Co. Litt. 12 *a*, Mr. Hargrave's note (1). The principle applies with double force in the case of a rebutter. It cannot be conceived that a gavelkind heir, or the youngest son in the case of borough English, who would thus be made responsible if the warrantee were evicted by a stranger, should not be rebutted in case he claimed the land himself, when the warrantee could thus circuitously recover the same land from him afterwards. In the case of Jourdan *v.* Jourdan, 9 Serg. & Rawle, 268, the attention of the court was drawn only to the general rule, without its qualification. That decision is the chief source of the present note. It is believed that if the counsel for the plaintiff in error had pursued his researches a little further and laid the authorities before the court, the result of the case would have been different." In the recent case of Carson *v.* Cemetery Co., *supra*, a tenant by the curtesy conveyed land to a stranger by deed purporting to convey the fee and containing the usual covenant of general warranty, and afterward executed to the heirs of his deceased wife, who owned the fee, an agreement which recited a release of the land by them to him without consideration, and concluded with a covenant on his part to stand seised of all his real estate to the use of them as his *heirs*. After his death, having received from him, as his heirs, assets of greater value than the land conveyed, they brought ejectment for the land, but the court, in an opinion which defines with precision the law of Pennsylvania upon the point, held that the covenant of warranty operating by way of rebutter barred their title. In the subsequent case of Baily *v.* Allegheny Bank, id. 425, lands were, by virtue of a direction for sale in a will, equitably converted into personalty. One of the legatees mortgaged her interest, and afterward all the legatees agreed to take the property as realty, and in a contest between the mortgagee and a subsequent mortgagee it was obviously held that the first mortgage, "which, as between the parties was an equitable assignment of the interest springing out of the realty, still adhered to and bound it in its newly assumed form of land." The argument pressed upon the court as to the effect of the recording acts (as to which see *infra*) had no application, because one taking title or an incumbrance from the legatee was bound to search the registry up to the date of the testator's death, and this would have disclosed the first mortgage.

In Massachusetts, in Bates *v.* Norcross, 17 Pick. 14, the plaintiff in an action of ejectment deduced a perfect title to himself for the premises in question, but the defendant proved that the plaintiff's wife was the sole heiress of one who, though without title, had purported to sell the same land by a deed which contained a covenant of warranty, and urged that as this warranty would descend upon the plaintiff's wife, who had received assets by descent out of which she would be obliged to make good the warranty of her father, it should rebut or preclude the plaintiff from recovering; in answer to which the latter contended that inasmuch as he could not derive a title to the premises from the ancestor of his wife, he was a purchaser for valuable consideration, so

[1] In Rhode Island, the twenty-first section of the statute of Anne was declared by Story, J., in Sisson *v.* Seabury, 1 Sum. (C. C. U. S.) 259, to have been included in the report made in 1749 of the English statutes in force in that State; and hence it was held that where one who in fact was tenant for life with remainder to his children, supposing himself to be tenant in tail, made a conveyance with warranty for the purpose of barring the entail according to a local statute, the remaindermen were not barred by the warranty contained in that deed, as it came directly within the provisions of the statute of Anne.

stance;[1] in others, the whole common law doctrine of lineal and

that so far as he was concerned it was a collateral warranty without assets, and therefore, by virtue of the statute of Anne, he was not rebutted. But the court said: "This is a case of lineal warranty with assets so far as the daughter, sole heir, and wife of the demandant is concerned. She at the time of her marriage was undoubtedly liable, and her liability devolved upon the husband and wife. If he was to be considered a purchaser for the valuable consideration of marriage of all that came to the wife, it was *cum onere*. He and his wife became and were seised of the real estate in her right, and he took the personal estate absolutely, but subject to all the liability to respond to the warranty of the ancestor. If the demandant were to recover, the tenant would have an action to recover back the value, and the judgment and execution would be against the husband and the wife, and might be levied upon the body or estate of the husband. So that if the husband should recover in this action, he himself would be liable eventually to refund the value." And the same decision has very recently been made in New Hampshire. Russ *v.* Perry, 49 N. H. 547.

In the subsequent case of Cole *v.* Raymond, 9 Gray, 217, Bates *v.* Norcross was approved, and the doctrine of rebutter applied to a case where it had been held that there was no liability on the covenant of the ancestor by reason of the remedy being barred by the statute of limitations. "While," it was said, "the usual incidents to the conduct of a personal action will be applied, yet this will not affect the covenant real in its broader application." See this case referred to *infra*.

In the recent case of Russ *v.* Alpaugh, 118 Mass. 369, where the subject was elaborately discussed, it was held that if the doctrine of rebutter by collateral warranty is part of the law of Massachusetts, it is only as restricted by the statute of Anne. "The statute," said Gray, C. J., delivering the opinion, "was passed many years before our Revolution, and is declared in its title to be for the amendment of the law of England and the better advancement of justice. Several other provisions of it have certainly been adopted in Massachusetts. . . . We are of opinion that in the absence of any evidence to the contrary, section 21, being a most just and equitable amendment of the severe rule of the common law, . . . must, if that rule ever became part of our law, be deemed to have been also adopted here."

[1] In Maryland, the twenty-first section of the statute of Anne is, according to the somewhat recent case of Crisfield *v.* Storr, 36 Md. 129, 146, in force, and therefore a covenant of warranty in a deed by which a life tenant undertook to convey the land in fee was held not to bar her son the remainderman, *en ventre* at the time of the conveyance, from recovering the land in ejectment after her death. "It was," said the court, "argued with much earnestness that [the plaintiff] was barred from recovering the land in question by the collateral warranty which descended upon him, and that the statute of 4 Anne, c. 16, is not in force in this State. That statute is found in Kilty's British Statutes, 246, among those which are in force in this State, and he says that the twenty-first section is proper to be incorporated as applicable to our circumstances, and as there is no other case to be found in which a collateral warranty has been enforced in our courts, we must presume that it has always been considered in force here, especially as it is peculiarly applicable to our circumstances, and well adapted to the policy of our laws and system of government, which favor and facilitate the free disposition and transmission of real estate. . . . The warranty of [his mother, the tenant for life] is therefore void as against [the plaintiff] and cannot affect his right of recovery against the defendants in the action of ejectment, because at the time of the warranty the remainder had . . . vested in him, and [his mother] had then a life estate only in the land."

The statute of Anne was re-enacted in New York in 1788, but the Revised Statutes have abolished both lineal and collateral warranties, and all their incidents. 4 Kent's Comm. 469; *infra*, p. 358, n. 2.

collateral warranty is deemed inapplicable to our system of juris-

In Delaware (Rev. Stats. 1874, c. 83, p. 508, § 28), it is declared that "a warranty made by a tenant for life shall not by descending or coming to a person in remainder or reversion bar or affect his title, and a collateral warranty shall not in any case bar or affect a title not derived from the person making such warranty." This was modified from the Rev. Stat. of 1847.

In North Carolina, the statute of Anne was re-enacted by the Revised Statutes of 1836, c. 43, § 8, and by the Code, 1883 (vol. i. c. 31, p. 533, § 1334), "All collateral warranties are abolished; and all warranties made by any tenant for life of lands, tenements, or hereditaments, the same descending or coming to any person in reversion or remainder shall be void; and all such warranties as aforesaid shall be deemed covenants only, and bind the covenantor in like manner as other obligations." Johnson *v.* Bradley, 9 Ired. 362; see Moore *v.* Parker, 12 id. 129. In Flynn *v.* Williams, 1 id. 509, it was held that where one to whom an estate had been devised with an executory devise over in case of his death without issue should sell the same with a covenant of general warranty, his heirs would be barred either with or without assets, and whether the warranty was lineal or collateral. In the subsequent case of Spruill *v.* Leary, 13 Ired. 225, a testator devised his estate to his four sons and their heirs, and at the death of any of them without issue his share was to go to the survivors. The sons made partition, and afterwards one of them conveyed his share to a purchaser with a covenant of general warranty, and afterwards died without issue; and it was held, upon the authority of Flynn *v.* Williams, that the collateral warranty which descended upon his brothers, who were his heirs, barred them. "It is an artificial and hard rule," said Ruffin, C. J., "the practical operation of which at this day is to enable one man to sell another's land without compensation, directly or indirectly, which is not agreeable to the reason and justice of modern law. But it is nevertheless the law, because it was undoubtedly so anciently, and the legislature has not seen fit to alter it. For it is not within the statute of Anne . . . because William Jones was not simply tenant for life, nor entitled to the bare right to the inheritance, but had the fee simple in possession at the time he entered into the warranty. . . . He had an estate to him and his heirs in possession with an executory devise over in fee, and consequently his warranty is not one of those made void by the act, as the warranty of an ancestor who had no estate of inheritance in possession of the land." But from this opinion Pearson, J., dissented in an able opinion (13 Ired. 408), and showed that in Flynn *v.* Williams the estate had been devised to one brother, subject to a condition in favor of another brother who died first without issue, leaving the first taker his heir, whereby the latter had both the estate and the condition to which it was subject; and in the more recent case of Myers *v.* Craig, 1 Busb. 169, Spruill *v.* Leary was distinctly overruled, and it was held that the taker of the first fee, under a conditional limitation or executory devise by which a fee is limited after a fee, could not by bargain and sale with warranty bar the taker of the second fee without assets descended. The peculiarity of the recent case of Southerland *v.* Stout, 68 N. C. 446 — which was ejectment by the grantee in fee simple with general warranty from a life tenant — lies in the fact that the defendant, who was the daughter of the life tenant deceased, though in possession of the land, set up no title to the remainder or reversion either in herself or her father, but relied on the outstanding title of her father's grantor, with whom she showed no privity of blood, contract, or estate. The court held that as she did not bring herself within any of the statutory exceptions to the rule of the common law, she was rebutted by her father's warranty, and accordingly, reversing the judgment of the court below, entered judgment for the plaintiff. The same rule was afterward applied in Bell *v.* Adams, 81 id. 118.

In Alabama, "all warranties by any tenant for life are void, as against those

prudence,[1] while in others, lineal and collateral warranty, with all their incidents, have been abolished by statute.[2]

§ 240. The practical difference between the heir being merely liable to respond in damages for the breach of his ancestor's covenant and to the extent of the assets received by him, and being barred by reason of that covenant from claiming the land itself which had been improperly conveyed, is immense. In the case, for example, of a conveyance with covenants for title by a tenant

in remainder or reversion." (Code, 1876, p. 573, § 2192.)

To the same effect is the statute of New Jersey (Revision of 1877, p. 166, § 75), with the additional provision that "a collateral warranty which shall be made of lands, tenements, or hereditaments by an ancestor, who at the time of making it hath no estate of inheritance in possession therein, shall be inoperative and void against his heirs." (Id. § 76.) Den *v.* Robinson, 2 South. 707; Den *v.* Crawford, 3 Halst. 90.

The statute of South Carolina is substantially the same as that of New Jersey. (Gen. Stats. of S. C., 1882, part 2, tit. 1, c. 59, p. 532, § 1809.)

For a reference to the Virginia statutes on this subject the student may consult Urquhart *v.* Clarke, 2 Rand. 549; Norman *v.* Cunningham, 5 Gratt. 63. "When the deed of the alienor mentions that he and his heirs will warrant what purports to pass or assure, if anything descends from him, his heirs shall be barred for the value of what is so descended, or liable for such value." (Code of Va., 1873, tit. 33, p. 888, § 7.

[1] "The statute of Anne," says Kent, "does not appear to have been generally or formally re-enacted in our American statute laws, because the law of lineal and collateral warranty never has been generally adopted in our American jurisprudence." (4 Comm. 469.)

In the somewhat recent case of Pollock *v.* Speidel, 17 Ohio, 439, the case was, in the absence of all statutory enactment, rested on the broad and satisfactory ground that the modern covenants for title are personal covenants merely, giving a remedy against the grantor by a recovery in damages, and hence that a tenant in tail could not, by deed with covenant of warranty, bar the entail or deprive his issue of the right to the inheritance, whether assets did or did not come to them from his estate.

[2] In New York, "lineal and collateral warranties, with all their incidents, are abolished; but the heirs and devisees of every person who shall have made any covenant or agreement shall be answerable upon such covenant or agreement, to the extent of the lands descended or devised to them, in the cases and in the manner prescribed by law." (Rev. Stats. of N.Y., 1882, vol. iii. part 2, c. 1, p. 2195, § 141.)

The same statute has been enacted in Dakota (Levisee's Rev. Codes, 1883, vol. ii. p. 883, § 633); Indiana (Rev. Stats., 1881, p. 582, § 2925); hence where, in Hartman *v.* Lee, 30 Ind. 281, a tenant by the curtesy sold with covenant of warranty, it was held that the children of the mother, though they had received by descent from their father assets of greater value, were not barred from claiming the land — that the remedy on the covenants must be prosecuted against the personal representative, according to the statute as to decedents' estates; Missouri (Rev. Stats., 1879, c. 69, p. 676, § 3944), Chauvin *v.* Wagner, 18 Mo. 553; Whittlesey *v.* Brohammer, 31 id. 98; Sauer *v.* Griffin, 67 id. 654; Barlow *v.* Delaney, 86 id. 583; Montana (Rev. Stats., 1879, p. 444, § 226); and Nevada (Comp. Laws, 1873, vol. i. c. 26, p. 86, § 276).

It has been held in Missouri that the same rules of construction are in all respects applicable to this statute as to that of Kentucky (*supra*, p. 352, n. 3); Miller *v.* Bledsoe, 61 Mo. 96.

by the curtesy, apart from the old doctrine of warranty, the law casts the estate of the mother upon the heir, who, retaining that estate, is also, as heir of the father, bound out of *his* estate to pay damages to the covenantee. Yet by the introduction of a doctrine which as long ago as the time of Edward the First was found to work injustice even as applied to feudal tenures,[1] and which is wholly inapplicable to the modern system of law, the heir is practically forced to confirm his father's unauthorized sale, is debarred from claiming the estate inherited from his mother, and must content himself by retaining the assets of his father's estate — in other words, he is forced to sell his mother's estate for the price which his father chose to take for it, and to accept and retain the latter as a recompense for the loss of the former.

Unless where the effect of warranty was restrained by statute, its benefit inured to him who had received it, both as a means of redress and as a defence against the warrantor and his heirs, and this was no doubt originally founded upon the desire to prevent the circuity of action which would arise if the warrantor or his heirs were allowed to regain possession of the land; as they would immediately be obliged, by means of a *warrantia chartæ*, to restore its value to the party from whom it had thus been taken.[2]

§ 241. But while such was the operation of a warranty by means of rebutter, the doctrine of estoppel was in its principle far different,[3] and while the former *was dependent upon the presence of a warranty*, such was not the case with the latter, which had a wider scope, and might be caused either by matter of record, by matter of deed, or by matter *in pais*, and was, we are told, called an estoppel or conclusion, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth."[4] "An estoppel by deed," says Mr. Bigelow

[1] See *supra*, 4 *et seq.*

[2] The practical result of engrafting, as has been done by a large class of American decisions, a supposed part of the doctrine of warranty upon the system of modern conveyancing introduced by the statute of Uses has led, as will be hereafter seen, to their unconscious administration of equitable principles through the medium of common law forms, and this even in States where the administration of law and equity is most carefully confined to separate tribunals.

[3] Though as regards the effect just referred to there was a similarity between them, a rebutter being in this respect "a kind of estoppel." Co. Litt. 352 *b*.

[4] Co. Litt. 352 *a*. "The reasons why estoppels are allowed," says Mr. Butler, in his note to this passage, "seem to be these: No man ought to allege anything but the truth for his defence, and what he

with greater precision, "may be defined in a strict sense to be a right based upon a preclusion against the competent parties to a valid sealed instrument and their privies to deny its force and effect by any evidence of inferior solemnity." [1]

§ 242. This was the ordinary and personal effect of an estoppel by deed. But it had also a much higher operation, which was in certain and exceptional cases actually to transfer and pass an estate; so that if a man conveyed to another land to which he had no title, any after-acquired title would inure to the latter by direct operation of law, and become vested in him in the same manner as if it had originally passed to him by the assurance.

§ 243. Now it must be carefully observed that by the common law there were two classes of cases in which an estate thus actually *passed* by estoppel, and two only. The first was where the mode of assurance was a feoffment, a fine, or a common recovery. Such was their solemnity and high character that they always passed an *actual* estate, by right or by wrong, and as against the feoffor or conusor and his heirs, not only divested them of what

has alleged once is to be presumed true, and therefore he ought not to contradict it. Secondly, as the law cannot be known till the facts are ascertained, so neither can the truth of them be found out by evidence; and therefore it is reasonable that some evidence should be allowed of so high and conclusive a nature as to admit of no contradictory proof." An illustration is found in Temple *v.* Partridge, 42 Me. 56. There, the grantee of land, having himself conveyed it with a covenant of warranty to a third person, was sued by his grantor for damages for obtaining title by fraudulent representations as to the value of the land. The defendant offered to prove that there was an incumbrance which diminished its value; but the court excluded the evidence, on the ground that it would have contradicted his covenant to his own grantee. "The defendant is not permitted to prove those solemn declarations made by himself to be false."

Illustrations may also be found in cases where a grantor who conveys with a covenant of warranty afterward acquires, with the warranty of his grantee, the title so conveyed, and when seeking to recover on the covenant of the grantee for a breach existing before his own covenant, is held to be estopped by the latter. Such a case is Fields *v.* Willingham, 49 Ga. 344. A singular application of the principle is found in Scoffins *v.* Grandstaff, 12 Kans. 467. Scoffins, claiming title to land by a deed which was in fact void, executed a general warranty deed with covenants for seisin, against incumbrances, and for quiet enjoyment to Adams "his heirs and assigns." Adams took possession and executed a quitclaim deed to Purdon, giving possession with the deed. Grandstaff was, at the time the suit was brought, in possession under Purdon's grantee. After Adams quitclaimed to Purdon, Scoffins acquired the legal title, which inured to Adams, who thereupon quitclaimed to Scoffins, who then brought ejectment against Grandstaff. But the court held that although Adams might have maintained the action against Grandstaff, Scoffins was estopped by his covenant for quiet enjoyment; "and it follows, therefore," said Valentine, J., delivering the opinion, "that the after-acquired title of Scoffins inures by way of equitable estoppel to the benefit of the said defendant."

[1] Bigelow on Estoppel (4th ed.), 322.

they then had, but of every estate which they might thereafter by possibility acquire,[1] and this doctrine has been applied in modern times.[2] The second was where the assurance was by lease, under which, it will be remembered, estates could take effect *in futuro;* and the estoppel seems to have been put upon the ground of such having been the contract or agreement between the parties — the same contract which on the part of the lessor implied a covenant for quiet enjoyment from the word *demise*, and on the part of the lessee implied a covenant for payment of the rent from the words *yielding and paying*.[3]

[1] Touch. 204–210; Co. Litt. 9 *a*, 49 *a*; Plowden, 423. This is thus clearly put in Williams on Real Property: "The formal delivery of the seisin or feudal possession which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that if a person should have made a feoffment to another of an estate in fee simple, or of any other estate not warranted by his own interest in the lands, such a feoffment would have operated *by wrong*, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment, along with the seisin actually delivered. Thus if a tenant for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong; accordingly, such feoffment by a tenant for life was regarded as a cause of forfeiture to the person entitled in reversion; such a feoffment being in fact a conveyance of his reversion without his consent to another person." 6th Am. ed. 145.

And as to a common recovery, this has been thus plainly stated by Mr. Bigelow: "The effect of a common recovery was to pass to the recoveror an estate in fee simple absolute, and thereby to bar not only the estate of the tenant in tail who suffered it, but all remainders and reversions expectant thereon and all executory limitations and conditions to which the estate tail had been subject. But it was necessary in every case of a recovery, following the rules which governed real actions, that the person against whom the action was brought should be actually seised of the freehold, otherwise the recovery was void. The same result must then have followed as in the case of a feoffment. If the tenant were a disseisor, as in the case of the presumptive heir disseising the ancestor in tail, he had a freehold estate; and this the demandant recovered. And when the title descended, it passed of necessity to the recoveror; for the tenant could not enter upon him contrary to his conveyance so as to enfeoff another, or to suffer a fine or another recovery. And an attempt to alien the interest by bargain and sale, grant or release, would be futile, for the same reason that prevailed where a feoffment had been made. Concerning this method of assurance also we fail to find any the slightest evidence that the 'transcendent effect of estoppel' was anything else than the operation of the assurance itself in its very nature." Estoppel (4th ed.), 410.

[2] Doe d. Christmas *v.* Oliver, 5 Man. & Ryl. 202; s. c. 10 Barn. & Cress. 181; Helps *v.* Hereford, 2 Barn. & Ald. 242; Doe d. Thomas *v.* Jones, 1 Cromp. & Jerv. 528. See the examination of Messrs. Humphries, Coote, and others, before the Real Property Commissioners, 1 Real Prop. Report.

[3] Bac. Abr. tit. Leases, 296, 441; Rawlyns' case, 4 Rep. 53; Weale *v.* Lower, Pollex. 60; Smith *v.* Low, 1 Atkyns, 490; Trevivan *v.* Lawrence, 1 Salk. 276; Webb *v.* Austin, 7 Man. & Grang. 701; McKenzie *v.* City of Lexington, 4 Dana, (Ky.) 129. The doctrine of these cases naturally arises from the peculiarity of the relation between landlord and tenant, to

§ 244. These modes of assurance were *the only ones* by which an after-acquired title was actually *passed by direct operation of law* under the doctrine of estoppel. Thus a grant or a release had not this effect. They only operated upon the estate which the grantor or releasor actually had, "and therefore if a man grant a rent-charge out of the manor of Dale, and in truth he hath nothing in that manor, and after he purchases the manor, yet he shall hold it discharged," [1] and this applied equally to a release.[2]

which also other branches of the law of estoppel apply. The estoppel *in pais* which prevents the tenant from denying the landlord's title depends upon the tenant's obligation, express or implied, that he will at some time or in some event surrender the possession. The distinction between the relation of landlord and tenant and that of vendor and purchaser is clearly recognized in the cases cited *supra*, p. 190.

In Williams on Real Property the law on this subject is thus noticed: "The circumstance that a lease for years was anciently nothing more than a mere contract explains a curious point of law relating to the creation of leases for years *which does not hold with respect to the creation of any greater interest in land.* If a man should by indenture lease lands in which he has no legal interest, for a term of years, both lessor and lessee will be estopped during the term, or forbidden to deny the validity of the lease. This might have been expected. But the law goes further, and holds that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly acquired estate of the lessor, and shall become for all purposes a regular estate for a term of years. If, however, the lessor has at the time of making the lease any interest in the land he lets, such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant." 6th Am. ed., 395.

[1] Perkins, tit. Grant, § 65; Wivel's case, Hob. 45; Touch. 240; Lampet's case, 10 Rep. 48.

[2] Brooke's Abr. tit. Estoppel, pl. 146; Doe d. Lumley *v.* Scarborough, Ad. & Ell. 2, where it was conceded in the argument. The well-considered judgment in Right d. Jefferys *v.* Bucknell, 2 Barn. & Adolph. 278, leaves no doubt as to this, did any exist. In that case, Jarvis the elder, having contracted to purchase certain premises, was let into possession by order of the Court of Chancery, and afterwards, without having received a conveyance, devised them to his son, Jarvis the younger, who entered and mortgaged them by indentures of lease and release to the lessors of the plaintiff, reciting that he was legally *or equitably* entitled thereto, and covenanting that he was legally *or equitably* rightfully, absolutely, and solely seised, etc. Some years after, Jarvis the younger became seised of the legal estate, which he afterwards conveyed by mortgage for a valuable consideration to Bucknell, the defendant, who had no notice of the prior mortgage and to whom all the title-deeds were delivered, and upon ejectment being brought by the first mortgagee against the second, it was held that at law the plaintiff was not entitled to recover. The question on which the court took time to consider, said Lord Tenterden, who delivered the opinion, was whether the defendant, claiming under the mortgagor, Jarvis the younger, could set up as a defence against the lessors of the plaintiff the legal estate acquired by him since their mortgage. There was no doubt, he said, that a fine might operate as an estoppel. Help *v.* Hereford, 2 B. & Ald. 242, and Doe *v.* Oliver, 10 B. & C. 181, were instances, but this was not the case of a fine. So there might be an estoppel by indenture or deed poll; Littleton, § 693; Co. Litt. 252 *a*; if the recital

And as the conveyances in use at the present day — which take effect by virtue of the statute of Uses, and which as distinguished from feoffments, fines, and common recoveries were called "innocent conveyances," viz. deeds of bargain and sale, lease and release, etc. — pass no more than the actual estate of the party, they have of course no greater effect by way of estoppel than the common law grant or release.[1]

§ 245. Where, however, it has distinctly appeared in such conveyance, either by a recital, an admission, a covenant, or otherwise, that the parties actually intended to convey and receive, reciprocally, a certain estate, they have obviously been held to be

were of a particular fact; Salter *v.* Kidley, Show. 59; but here there was no "certain precise averment in the deed of release of any seisin in Jarvis the younger, but a recital only that he was legally or equitably entitled." Such a recital could not operate as an estoppel. Nor did the release by mere force of the words "grant, bargain, sell, alien, remise, release," etc. amount to an estoppel, for Littleton lays it down, § 446, that "no right passeth by a release but the right which the releasor hath at the time of the release made." To the same effect were Wivel's case, Hob. 45, and Perk. § 65; Y. B. 49 Edw. III. 14, 15; 45 Ass. 5; 46 Ass. 6; Brooke's Abr. tit. Estoppel, pl. 146; 10 Vin. Abr. tit. Estoppel, M. The common rule that a mortgagor cannot dispute the title of his mortgagee was inapplicable, for the defendant Bucknell claimed, as the purchaser for a valuable consideration without notice, a legal interest which was not in Jarvis at the time of his mortgage to the lessors of the plaintiff, and Jarvis had an equitable interest which passed to them and was not questioned nor sought to be disturbed by the defence which Bucknell set up: "This case much resembles that of Goodtitle *v.* Morgan, 1 Term, 755, where a second mortgagee, without notice, who got in the legal title by taking an assignment from a trustee and the mortgagor of an outstanding term assigned to attend the inheritance, was held entitled to a legal preference against the first mortgagee. There, as here, it might have been said that he was bound by the same conclusion as the mortgagor, and should not question the right of the prior mortgagee. But the legal title prevailed there, and so we think it ought here."

The student will observe that the argument in Right *v.* Bucknell was based solely on the rights of the parties as presented in a court of *law*, and that it is expressly said that the equitable interest which passed to the lessors of the plaintiff was "not questioned nor sought to be disturbed by the defence which Bucknell set up." The case is, therefore, distinguishable from that class in which, *in equity*, the acquisition of a subsequent estate will be held to operate in favor of a prior mortgagee or purchaser, as an executory agreement to convey, whenever the intention of the parties is apparent, and sustained by a sufficient consideration. Seabourne *v.* Powell, 2 Vern. 11; *supra*, p. 133, n. 3; Lamar *v.* Simpson, 1 Rich. Eq. (S. C.) 71; Wright *v.* Shumway, 1 Biss. (Ky.) 23; and see *infra*. Doe *v.* Pott, 2 Douglas, 720, decided by Lord Mansfield in 1781, was a case where a lord of a manor, having mortgaged the manor, afterwards purchased copyhold lands held of this manor and took surrenders of them; and it was held that by the mortgage of the "manor" all its consequences and incidents passed; that the manor being mortgaged in fee, the mortgagor could not afterwards sever the copyholds, because that would have diminished the security, "for the mortgagee had a right to the services, quitrents, escheats, forfeitures, and other casualties."

[1] Kennedy *v.* Skeer, 3 Watts, (Pa.) 98; Clark *v.* Baker, 14 Cal. 627.

personally estopped from denying the operation of the deed according to this intent.[1]

§ 246. There was then an ordinary and an extraordinary effect attached to an estoppel. The one was personal in its character, like the rebutter in a warranty, and estopped the grantor and his heirs from doing or alleging anything contrary to the tenor and effect of his sealed instrument. This effect, however, was purely personal as against him or them; the remedy being sometimes enforced in a court of law and for the avoiding of circuity of action by reason of breach of covenant, and more frequently in equity, by further assuring to the grantee the estate which had thus been *intended* to be conveyed. But it never operated to pass an estate by direct operation of law. The other — the extraordinary — effect possessed the high function of *actually transferring* every estate, present or future, vested or contingent, to the feoffee, conusee, or lessee, according as the mode of assurance employed was a feoffment, a recovery, a fine, or a lease, and this effect was peculiar to them alone, there being no authority[2] in any of the English books to show that it was produced by any other species of conveyance.[3]

§ 247. This sketch of some of the principal features of the doctrine of estoppel by deed has thus been made as introductory to an important class of cases which, on this side of the Atlantic, has given to some of the modern covenants for title, and especially to the covenant of warranty, the function just referred to, which is properly attributable only to the effect of an estoppel in its highest sense.

The history of the law on this side of the Atlantic is this. It was decided in two early cases in New York that where one by deed of bargain and sale, or lease and release, conveyed land to

[1] Goodtitle *v.* Bailey, Cowp. 597; Doe *v.* Errington, 8 Scott, 210; Bowman *v.* Taylor, 2 Ad. & El. 278; Carver *v.* Jackson, 4 Pet. (S. C. U. S.) 86; Van Rensselaer *v.* Kearney, 11 How. (S. C. U. S.) 325; French *v.* Spencer, 21 id. 240; Clark *v.* Baker, 14 Cal. 627; Smith *v.* Pendell, 19 Conn. 107; Fitzhugh *v.* Tyler, 9 B. Mon. (Ky.) 561; Fisher *v.* Hallock, 50 Mich. 463; Williams *v.* Claiborne, 1 Sm. & Marsh. (Miss.) 365; Gibson *v.* Chouteau, 39 Mo. 536; Den *v.* Brewer, Coxe, (N. J.) 172; Decker *v.* Caskey, 2 Green's Ch. (N. J.) 449; McBurney *v.* Cutler, 18 Barb. (N. Y.) 208; Kinsman *v.* Loomis, 11 Ohio, 478; Williams *v.* Presbyterian Society, 1 Ohio, 478; Bayley *v.* McCoy, 8 Or. 259; Root *v.* Crock, 7 Pa. 380.

[2] Except the case of Bensley *v.* Burden, 2 Sim. & Stu. 519, which has since been overruled. See *infra*.

[3] See Doe *v.* Oliver, 2 Smith's Lead. Cas. The quotation from Littleton, § 446, will be presently referred to.

which he had no title, he was estopped by his deed from claiming any after-acquired estate in it.[1] It does not appear in the report of the cases whether the deeds did or did not contain covenants for title; but the decisions were rested on the authority of familiar cases decided upon fines and leases.[2]

But this doctrine, which was unsupported by early authority, was soon after abandoned, and it was held by the same court, reversing the cases referred to, that where one conveyed land to which he had no title, by deed of bargain and sale containing no covenants for title, nor intention on the face of the deed that the grantee expected to become invested with a certain estate, a subsequently acquired title would not inure to the benefit of the grantee, even as against the grantor and his heirs.[3] This decis-

[1] Jackson *v.* Bull, 1 Johns. Cas. 81; Jackson *v.* Murray, 12 Johns. 201.

[2] Jackson *v.* Bull was decided by Kent, J., on the authority of Ischam *v.* Morrice, Cro. Car. 110; Co. Litt. 45 *a*, 47 *b*, 352, *a*, *b*; Rawlyns' case, 4 Rep. 53 *a*; Piggot *v.* Earl of Salisbury, 2 Mod. 115; Trevivan *v.* Lawrence, 6 id. 258; s. c. 1 Salk. 276; Palmer *v.* Elkins, 2 Raym. 1551; and Nick *v.* Edwards, 3 P. Wms. 373; which cases indeed justify the conclusion arrived at by that learned judge that "if a man *make a lease* of land by indenture which is not his, or *levy a fine* of an estate not vested, and he afterwards purchases the land, he shall, notwithstanding, be bound by his deed, and not be permitted to aver he had nothing, and the stranger to whom he sells will equally be estopped." But the difference between the modes of assurance here referred to and conveyances under the statute of Uses has already been noticed. Nelson, J., in speaking (in Pelletreau *v.* Jackson, 11 Wend. 119) of Jackson *v.* Bull and Jackson *v.* Murray, said, "It does not appear in either of them whether there was a covenant of warranty or not. . . . If not, though the doctrine of them may be sound, I apprehend there would be difficulty in reconciling them with the rule in Littleton," etc. The rule thus referred to will be noticed *infra*.

In Mississippi, by statute, "A deed of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed, and shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed." Code of Mississippi, 1880, § 1195. The statute is inapplicable to a title acquired by the grantor's wife after his conveyance. Carter *v.* Bustamente, 59 Miss. 559.

[3] Jackson *v.* Wright, 14 Johns. 193. The facts were these. Boise by deed-poll in 1794 granted, bargained, sold, and quitclaimed to the lessor of the plaintiff in fee "all that military right or parcel of land granted to him as bounty lands for his services during the late war." The deed contained no covenants for title. In 1806, an act of the legislature was passed, authorizing letters patent to be granted to Boise "for the quantity of two hundred acres of land in the tract set apart for the use of the line of this State serving in the army of the United States," and the land was accordingly patented to him. The judge ruled that the deed from Boise to the lessor of the plaintiff, being prior in date to the patent, did not entitle him to recover, and a verdict having passed for the defendant, the case was submitted, on a motion for a new trial, without argument, when it was said, "The deed from Boise to McCrakin is a bargain and sale and quitclaim, and he had then no title to convey in the premises; and no title not then *in esse* would pass unless there was a warranty in the deed, in which last case it would operate as an estoppel for avoiding circuity of action."

ion has been almost consistently followed, and a large class of cases, both in New York and throughout the United States, has established the conclusion that as a general rule, and apart from the doctrine of estoppel caused by recital, in order that an after-acquired estate should pass by estoppel, it is necessary that the deed should contain covenants of some sort or kind. And while it is true that an intention — shown by recital, averment, or otherwise, that a certain definite estate was intended to be conveyed — will generally be allowed the same effect as though it were a covenant,[1] yet it is considered that the presence of a covenant is perhaps the strongest evidence that such was the intention and the contract of the parties. But a mere release, or a deed of quit-claim, will not have the effect of estoppel.[2]

[1] In the well-considered case of Van Rensselaer *v.* Kearney, 11 How. (S. C. U. S.) 298, it is shown that "If the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with, an estate of a particular description or quality, and that the bargain had proceeded upon that footing, then, *although it may not contain any covenants for title in the technical sense of the term*, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterward denying that he was seised of the particular estate at the time of the conveyance." In other words, it may have the same effect as a covenant, and possibly a greater one. See *infra*.

[2] Tillotson *v.* Kennedy, 5 Ala. 413; Cadiz *v.* Majors, 33 Cal. 288; Quivey *v.* Baker, 37 id. 465; Dart *v.* Dart, 7 Conn. 256; Frink *v.* Darst, 14 Ill. 308 (overruling Frisby *v.* Ballance, 2 Gilm. (Ill.) 141); Bennett *v.* Waller, 23 Ill. 182; Avery *v.* Aikins, 74 Ind. 283; Locke *v.* White, 89 id. 492; Simpson *v.* Greeley, 8 Kans. 586; Bruce *v.* Lake, 9 id. 201; Scoffins *v.* Grandstaff, 12 id. 467; Bohon *v.* Bohon, 78 Ky. 408; Fox *v.* Widgery, 4 Greenl. (Me.) 218; Ham *v.* Ham, 14 Me. 351; Comstock *v.* Smith, 13 Pick. (Mass.) 116; Blanchard *v.* Brooks, 12 id. 47, 66; Taft *v.* Stevens, 3 Gray, (Mass.) 504; Weed Sewing Machine Co. *v.* Emerson, 115 Mass. 554; Brown *v.* Phillips, 40 Mich. 264; Mitchell *v.* Woodson, 37 Miss. 578 (but see the statute of Mississippi, *supra*, p. 365, n. 2); Bogy *v.* Shoab, 13 Mo. 365; Valle *v.* Clemens, 18 id. 486; Gibson *v.* Chouteau, 39 id. 536; Butcher *v.* Rogers, 60 id. 138; Kimmel *v.* Benna, 70 id. 52; Harden *v.* Cullins, 8 Nev. 49; Bell *v.* Twilight, 6 Fost. (N. H.) 401; Howe *v.* Harrington, 3 C. E. Green, (N. J.) 495; Smith *v.* De Russy, 29 N. J. Eq. 407; Jackson *v.* Hubble, 1 Cow. (N. Y.) 613; Jackson *v.* Winslow, 9 id. 18; Jackson *v.* Bradford, 4 Wend. (N. Y.) 619; Pelletreau *v.* Jackson, 11 id. 119; Jackson *v.* Waldron, 13 id. 178; Varick *v.* Edwards, 1 Hoffm. Ch. (N. Y.) 382; 11 Paige, (N. Y.) 290; Edwards *v.* Varick, 5 Denio, (N. Y.) 665; (these last cases were, in fact, the same controversy which arose under the will of Medcef Eden:) Sparrow *v.* Kingman, 1 Comst. (N. Y.) 247; Jackson *v.* Littell, 56 N. Y. App. 108; Cramer *v.* Benton, 64 Barb. (N. Y.) 522; Kinsman *v.* Loomis, 11 Ohio, 475; Hart *v.* Gregg, 32 id. 502; Burston *v.* Jackson, 9 Or. 275; Doswell *v.* Buchanan, 3 Leigh, (Va.) 365; Kent *v.* Watson, 22 W. Va. 561.

In cases of involuntary alienation, as where a creditor levies upon land of his debtor, the latter is not estopped to assert a subsequently acquired title. Freeman *v.* Thayer, 29 Me. 369; Bigelow on Estoppel (4th ed.), 388.

In Illinois, the doctrine that a quit-

§ 248. Where, however, the deed does contain such recital or averment, and more especially where it contains certain of the covenants for title, it has been held by a large class of cases that as a general rule any after-acquired estate will inure, by virtue of the covenants, to the party claiming under the conveyance and his heirs and assigns, *by direct operation of law*, with the same effect to all intents and purposes as if such estate had originally passed by the deed.[1] And in many States, the doctrine has been made

claim deed will not pass an after-acquired title not only is recognized as the common law of the State (Frink *v.* Darst, 14 Ill. 304), but is declared by statute (Rev. Stats., 1883, ch. 30, § 10, p. 280), and the same restriction is put upon the effect of a mortgage (id., § 11). The case of Welch *v.* Dutton, 79 Ill. 465, should not, therefore, be misunderstood. It was there held merely that the purchaser of land from the State has, after payment and before the issue of the patent, such a title as that by his quitclaim deed and the subsequent issue of the patent a legal title vested in the vendee. "The issuing of a patent to [the grantor] and his receipt of it was not the acquisition by him of a new title. It was only in consummation of and the completion of the title which he had previously by his quitclaim deed conveyed." To the same effect is Fisher *v.* Hallock, 50 Mich. 463, and it is only part of the doctrine that the inception of the title by purchase and its consummation by patent are part of the same title, the patent relating back to the inception. French *v.* Spencer, 21 How. (S. C. U. S.) 228. McCarthy *v.* Mann, 19 Wall. (S. C. U. S.) 20, turned upon the effect given by the court to an act of Congress, reinstating the title of the grantee as of the date of his entry.

[1] Kennedy *v.* McCartney, 4 Port. (Ala.) 141; Tillotson *v.* Kennedy, 5 Ala. 413; Bean *v.* Welsh, 17 id. 772; Blakeslee *v.* Mobile Life Ins. Co., 57 id. 205; Watkins *v.* Wassell, 15 Ark. 73; Trust & Loan Co. *v.* Ruttan, 1 Duval, (Canada,) 564; Klumpke *v.* Baker, 68 Cal. 559; Hoyt *v.* Dimon, 5 Day, (Conn.) 479; Dudley *v.* Cadwell, 19 Conn. 226; Sherwood *v.* Barlow, id. 476; Doe *v.* Dowdall, 3 Houst. (Del.) 369; O'Bannon *v.* Paremour, 24 Ga. 493; Rigg *v.* Cook, 4 Gilm. (Ill.) 348; Bennett *v.* Waller, 23 Ill. 183; Dewolf *v.* Hayden, 24 id. 525; Jones *v.* King, 25 id. 384; King *v.* Gilson, 32 id. 348; Gochenour *v.* Mowry, 33 id. 333; Hitchcock *v.* Fortier, 65 id. 239; Pratt *v.* Pratt, 96 id. 184; Hoppin *v.* Hoppin, id. 265; Hannah *v.* Collins, 94 Ind. 201; Thomas *v.* Stickle, 32 Io. 72; (in Scoffins *v.* Grandstaff, 12 Kans. 467, the after-acquired title was held to inure by way of equitable estoppel;) Massie *v.* Sebastian, 4 Bibb, (Ky.) 436; Logan *v.* Moore, 7 Dana, (Ky.) 76; Logan *v.* Steele, 4 T. B. Mon. (Ky.) 433; Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 64; Lawry *v.* Williams, 13 Me. 281; Baxter *v.* Bradbury, 20 id. 260; Pike *v.* Galvin, 29 id. 183 (overruling, as to the operation of the particular covenant there employed, Fairbanks *v.* Williamson, 7 Greenl. (Me.) 96, and see Ham *v.* Ham, 14 Me. 355, where Fairbanks *v.* Williamson was virtually denied; the dissenting opinion of Wells, J., in Pike *v.* Galvin, is in 30 id. 539); Williams *v.* Thurlow, 31 Me. 395; Read *v.* Fogg, 60 id. 479; Funk *v.* Newcomer, 10 Md. 316; Somes *v.* Skinner, 3 Pick. (Mass.) 52; Blanchard *v.* Brooks, 12 id. 47; Comstock *v.* Smith, 13 id. 116; Trull *v.* Eastman, 3 Met. (Mass.) 121; Wade *v.* Lindsey, 6 id. 413; Gibbs *v.* Thayer, 6 Cush. (Mass.) 30; Ruggles *v.* Barton, 13 Gray, (Mass.) 506; Farnum *v.* Peterson, 111 Mass. 148; Lee *v.* Clary, 38 Mich. 223; Hooper *v.* Henry, 31 Minn. 264; Wightman *v.* Reynolds, 24 Miss. 675; Mitchell *v.* Woodson, 37 id. 578; Kimball *v.* Blaisdell, 5 N. H. 533; Wark *v.* Willard, 13 id. 389; Thorndike *v.* Norris, 4 Fost. (N. H.) 454; Jewell *v.* Porter, 11 id. 39; Kimball *v.* Schoff, 40 N. H. 190; Hayes *v.* Tabor, 41 id. 521; Gough *v.* Bell, 1 Zabr. (N. J.) 156; Moore *v.* Rake, 2 Dutch. (N. J.) 574; Brundred *v.* Walker,

the subject of statutory enactment, and the legislation is to a great extent both recent and on the increase.[1]

1 Beasl. Ch. (N. J.) 140; Vreeland *v.* Blauvelt, 23 N. J. Eq. 483; Jackson *v.* Winslow, 9 Cow. (N. Y.) 18; Kellogg *v.* Wood, 4 Paige, (N. Y.) 578; Sparrow *v.* Kingman, 1 Comst. (N. Y.) 246; Rathbun *v.* Rathbun, 6 Barb. S. C. (N. Y.) 107; Mickles *v.* Dillaye, 15 Hun, (N. Y.) 296; Bell *v.* Adams, 81 N. C. 118; Patterson *v.* Pease, 5 Ohio, 190; Scott *v.* Douglass, 7 id. 227; Barton *v.* Morris, 15 id. 408; Pollock *v.* Speidel, 27 id. 86; Broadwell *v.* Phillips, 30 id. 255; Hart *v.* Gregg, 32 id. 502; Taggart *v.* Risley, 3 Ore. 306; s. c. 4 id. 235; Wilson *v.* McEwan, 7 id. 87; Potter *v.* Potter, 1 R. I. 44; Bailey *v.* Hoppin, 12 id. 560; Davis *v.* Keller, 5 Rich. Eq. (S. C.) 434; Harvin *v.* Hodge, Dudl. (S. C.) 23; Reeder *v.* Craig, 3 McCord, 411 (it does not appear in the reports of these cases that there was a covenant of warranty, but it was so stated in Starke *v.* Harrison, 5 Rich. L. (S. C.) 7); Mingo *v.* Parker, 19 S. C. 9; Robertson *v.* Gaines, 2 Humph. (Tenn.) 383; Coal Creek Mining Co. *v.* Ross, 12 Lea, (Tenn.) 1; Ackerman *v.* Smiley, 37 Tex. 211; Harrison *v.* Boring, 44 id. 255; Middlebury College *v.* Cheney, 1 Verm. 349; Blake *v.* Tucker, 12 id. 44; Goodenough *v.* Fellows, 53 id. 102; Cross *v.* Martin, 46 id. 14; Burtners *v.* Keran, 24 Grat. (Va.) 42 (where, however, it was held that the estoppel did not operate actually to transfer the estate); Raines *v.* Walker, 77 Va. 92; Mann *v.* Young, 1 Wash. Terr. 454; Mitchell *v.* Petty, 2 W. Va. 470; Pierce *v.* Milwaukee R. R., 24 Wis. 553; Wiesner *v.* Zaun, 39 id. 188; Trust & Loan Co. *v.* Covert, 32 U. Can. Q. B. 222; Terrett *v.* Taylor, 9 Cranch, (S. C. U. S.) 52; Mason *v.* Muncaster, 9 Wheat. (id.) 445; Irvine *v.* Irvine, 9 Wall. (id.) 617. In Harmer *v.* Morris, 1 McLean, (C. C. U. S.) 44, it does not appear whether there was a warranty or not, but it was held that the after-acquired estate passed.

Mr. Bigelow, in speaking of this class of cases (Estoppel, 4th ed., 420), remarks: "Mr. Rawle . . . says that in most of the States it is held that the presence of a covenant of general warranty in a conveyance will not only estop the grantor and his heirs from setting up an after-acquired title, but will by force of the covenant have the effect of actually transferring the new estate in the same manner as if it had originally passed by the deed; and he cites a cloud of cases for the statement. It will be found, however, that few of these cases required any decision of this question, and that the statements of the courts are for the greater part mere generalities, having reference to the relation of grantor and grantee or their real privies." This is quite true, and might be said generally as to many other classes of cases, but whether or not material to the decision, they announce and cling to a doctrine whose application in some of them was, to say the least, unfortunate (as will be seen *infra*). And with this, the learned author agrees. (Estoppel, p. 432.) As a rule, the cases themselves were correctly decided upon the facts, whatever objection may be taken to the doctrine on which they claim to rest.

[1] Thus the statute of Kansas is as follows: "Where a grantor, by the terms of his deed, undertakes to convey to the grantee an indefeasible estate in fee simple absolute, and shall not, at the time of such conveyance, have the legal title to the estate sought to be conveyed, but shall afterwards acquire it, the legal estate subsequently acquired by him shall immediately pass to the grantee; and such conveyance shall be as effective as though such legal estate had been in the grantor at the time of the conveyance." (Comp. Laws of Kans., 1879, c. 22, p. 211, § 5.) See Scoffins *v.* Grandstaff, 12 Kans. 467. In nearly the same words are the statutes of Arizona (Comp. Laws, 1877, c. 42, p. 384, § 33); Missouri (Rev. Stats., 1879, c. 69, p. 675, § 3940), in which State it is held that the statute does not apply to leasehold interests, Geyer *v.* Girard, 22 Mo. 159; Montana (Rev. Stats., 1879, p. 443, § 209); and Nevada (Comp. Laws, 1873, c. 26, p. 84, § 261).

The statutes of Illinois (Rev. Stats.,

§ 249. But while, apart from legislation, the general doctrine referred to is established by such a cloud of authorities, they

1883, c. 30, p. 279, § 7; as to which see Hoppin *v.* Hoppin, 96 Ill. 265; Dugan *v.* Follett, 100 id. 581.; Tyrrell *v.* Ward, 102 id. 29) and Colorado (Gen. Stats., 1883, c. 18, p. 171, § 201) do not materially differ from that of Kansas except in providing that the subsequently acquired legal estate "shall be taken and held to be in trust, and for the use of the grantee or vendee, and the conveyance aforesaid shall be held and taken and shall be as valid as if the grantor or vendor had the legal estate or interest at the time of said sale or conveyance." The difference is apparently of no practical importance.

The statute of Arkansas is somewhat differently expressed: "If any person shall convey any real estate by deed, purporting to convey the same in fee simple absolute, or any less estate, and shall not at the time of such conveyance have the legal estate in such lands, but shall afterward acquire the same, the legal or equitable estate after acquired shall immediately pass to the grantee, and such conveyance shall be as valid as if such legal or equitable estate had been in the grantor at the time of the conveyance." (Mansf. Dig. Stats. of Ark., 1884, c. 27, p. 276, § 642.) See Cocke *v.* Thorn, 5 Ark. 693; Watkins *v.* Wassel, 15 id. 73; Holland *v.* Rogers, 33 id. 251. This statute applies to corporations as well as individuals; Jones *v.* Green, 41 Ark. 363; and to voluntary sales only; Horsley *v.* Hilburn, 44 Ark. 458.

The statutes of California (Hittel's Codes and Stats., 1876, vol. i. p. 705, § 6106) and Dakota (Levisee's Rev. Codes, 1883, vol. ii. p. 883, pl. 4) are as follows: "Where a person purports by proper instrument to grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee, or his successors."

In Iowa, "Where a deed purports to convey a greater interest than the grantor was at the time possessed of, any after-acquired interest of such grantor, to the extent of that which the deed purports to convey, inures to the benefit of the grantee." (Rev. Code of Iowa, 1884, c. 5, p. 524, § 1931.) See Morgan *v.* Graham, 35 Io. 213; Rogers *v.* Hussey, 36 id. 664; Heaton *v.* Fryberger, 38 id. 185. This provision extends to mortgages, where there are no intervening equities. Rice *v.* Kelso, 57 Iowa, 115. The same statute has been enacted in Nebraska, with this qualification, viz.: "Provided however that such after-acquired interest shall not inure to the benefit of the original grantor, or his heirs or assigns, if the deed conveying said real estate was either a quitclaim or special warranty, and the original grantor in any case shall not be stopped from acquiring said premises at judicial or tax sale, upon execution against the grantee or his assigns, or for taxes becoming due after date of his conveyance." (Comp. Stats. of Neb., 1885, c. 73, p. 482, § 51.)

In Georgia, "The maker of a deed cannot subsequently claim adversely to his deed under a title acquired since the making thereof. He is estopped from denying his right to sell and convey." (Rev. Code of Ga., 1882, c. 8, p. 670, § 2699.) See Parker *v.* Jones, 57 Ga. 204.

The statute of Mississippi has already been noticed, *supra*, p. 365, n. 2.

The Appendix to the Code of Washington Territory (1881) contains at page 25 the following statute: "Whenever any person or persons having sold and conveyed by deed any lands in this Territory, and who at the time of such conveyance had no title to such land, and any person or persons who may hereafter sell and convey by deed any lands in this Territory, and who shall not at the time of such sale and conveyance have the title to such land, shall acquire a title to such lands so sold and conveyed, such title shall inure to the benefit of the purchasers or conveyee or conveyees of such lands to whom such deed was executed and delivered, and to his and their heirs and assigns forever. And the title to such land so sold and conveyed shall pass to and vest in the conveyee or conveyees of such

are not, at least so far as the covenants for title are concerned, altogether consistent, first, as to the grounds upon which the doctrine is based, nor secondly, as to what covenants will or will not produce such an effect.

And first, as to the grounds upon which the doctrine is based.

§ 250. As a general rule, it is said to rest on the ground of avoiding circuity of action,[1] and hence where, for any reason, no right of action ever existed on the covenant, or the same has been released, extinguished, or otherwise has ceased, there will, according to some authorities, be no estoppel, and the after-acquired estate will not pass.[2]

Thus in somewhat recent cases in Maine, in which State it is now held that no action will lie upon what is called the covenant of non-claim, (that is to say, a covenant that neither the grantor nor any other person shall thereafter claim any right or title to the premises,[3]) it has been decided that where that is the only covenant in the deed, inasmuch as there was never any right of action upon it, there will be no estoppel,[4] and the law had previously been held the same way in New York.[5]

So where the deed, although containing general covenants for title, does not on its face purport to convey an indefeasible estate,

lands and to his or their heirs and assigns, and shall thereafter run with such land." The effect of the apparent omission from the Code of 1881 of this statute, which was passed in 1871, may have been to repeal it, though this seems at least doubtful. See note by Public Printer, Appendix, p. 2. In Mann *v.* Young, 1 Wash. Terr. (N. S.) 454, the cause of action arose prior to the passage of this statute, which the court held was prospective only.

In the fourth edition of this treatise (p. 391, n. 2) were given the statutes in force at that time, and the decisions applicable to them. It will be observed from the above reference to the present legislation on the subject, first, that in many States the provisions of former statutes have been re-enacted; secondly, that in none in which there was legislation has it been repealed; and thirdly, that the number of States in which such legislation exists has been more than doubled since the last edition of this treatise.

Of such legislation it can only be said that the rule thus introduced would seem to be inflexible, and to override any equities that might otherwise avail the second purchaser. As to this, see *infra*.

[1] "Most of the early cases base the rule on the ground of preventing circuity of action, and this was the principal ground where the grantor or his heirs were the claimants." North *v.* Henneberry, 44 Wis. 313.

[2] Smiley *v.* Fries, 104 Ill. 416.

[3] See *supra*, § 22.

[4] Pike *v.* Galvin, 29 Me. 185, *supra*, p. 367, n. 1; Partridge *v.* Patten, 33 id. 483; Loomis *v.* Pingree, 43 id. 314; Harriman *v.* Gray, 49 id. 538. The rule was reasserted in Read *v.* Whittemore, 60 Me. 481, but as Mr. Bigelow says, "the propriety of such a construction has been very properly doubted." Bigelow on Estoppel (4th ed.), 397. See these cases more particularly referred to *infra*.

[5] Jackson *v.* Bradford, 4 Wend. (N. Y.) 622.

but only "the right, title, and interest" of the grantor; there, in cases where those covenants are held not to assure an absolute title, but to be limited and restrained by the estate conveyed, the doctrine of estoppel has been considered not to apply; in other words, although the covenants are as a general rule deemed to be invested with the function of estoppel in passing an after-acquired estate by mere operation of law, yet they will lack that effect when it appears that the grantor intended to convey no greater estate than he was really possessed of. Thus where, in a case in Massachusetts, a devisee, being entitled to a vested remainder in one moiety and a contingent remainder in another moiety of certain real estate held in common with other devisees, conveyed "all his right, title, and interest in and to the undivided real estate devised," with unlimited covenants of warranty and for quiet enjoyment, it was held that the deed conveyed only his vested interest, and the warranty being only coextensive with the grant, he was not thereby estopped to claim the contingent interest when by the happening of the contingency it became vested,[1] and this doctrine has been repeatedly and recently affirmed not only in that State but in others,[2] and has

[1] Blanchard *v.* Brooks, 12 Pick. (Mass.) 47, 67. "The grant in the deed," said Shaw, C. J., in delivering the opinion, "is of all his right, title, and interest in the land, and not of the land itself, or any particular estate in the land. The warranty is of the premises, that is, of the estate granted, which was all his right, title, and interest. It was equivalent to a warranty of the estate he then held or was seised of, and must be confined to estate vested. A conveyance of all the right, title, and interest in land is certainly sufficient to pass the land itself if the party conveying has an estate therein at the time of the conveyance, but it passes no estate which is not then possessed by the party. Brown *v.* Jackson, 3 Wheat. 452. The grant in legal effect operated only to pass the vested interest and not the contingent interest, and the warranty, being coextensive with the grant, did not extend to the contingent interest, and, of course, did not operate upon it by way of estoppel."

[2] Holbrook *v.* Debo, 99 Ill. 372; Shumaker *v.* Johnson, 35 Ind. 33; Locke *v.* White, 89 id. 492; Derby *v.* Jones, 27 Me. 361; Coe *v.* Persons unknown, 43 id. 436; Wight *v.* Shaw, 5 Cush. (Mass.) 56; Miller *v.* Ewing, 6 id. 34; Hoxie *v.* Finney, 16 Gray, (Mass.) 332; Sanford *v.* Sanford, 135 Mass. 314; Bogn *v.* Shoab, 13 Mo. 365; Valle *v.* Clemens, 18 id. 486; Hall *v.* Chaffee, 14 N. H. 215; Adams *v.* Ross, 1 Vroom, (N. J.) 509 (reversing s. c. 4 Dutch. 160); White *v.* Brocaw, 14 Ohio St. 339; Wynn *v.* Harman, 5 Grat. (Va.) 162; Lewis *v.* Baird, 3 McLean, (C. C. U. S.) 78. "The deed only purports to pass all the right, title, and estate which the grantor possessed in the land, and does not operate upon interests subsequently acquired. If the plaintiff at the time possessed any estate in the premises, whether in fee, or for life, or for years, the same vested by the conveyance, and the effect of the covenant is only to estop him and parties under him from asserting any claim to such estate. In other words, the terms of the deed denote that the grantor only intended to transfer the es-

also been approved very lately by the Supreme Court of the United States.[1]

So it has been held that where the covenant for seisin is satisfied by the transfer to the purchaser of an actual though a tortious seisin (as is the case in several of the New England States),[2] no estoppel will be created by that covenant.[3] So, too, it is considered that there is no estoppel when the covenants have been extinguished.[4] So obviously, where they are limited to the acts of the grantor, and, by reason of the defect of title not being of his own creation and therefore not coming within the scope of the covenant, the purchaser cannot maintain an action upon them, there will be no estoppel and the after-acquired estate will not pass to the latter.[5] And the same doctrine has obviously been

tate which he at the time possessed, and the covenant is restrained by the estate conveyed." Gee *v.* Moore, 14 Cal. 474; Kimball *v.* Semple, 25 id. 452; Hope *v.* Stone, 10 Minn. 149. In Brigham *v.* Smith, 4 Gray, (Mass.) 297, it was obviously held that the covenant of warranty in a conveyance did not estop the grantor from claiming a way of necessity over the land conveyed. And where one conveyed land by warranty deed, excepting twenty acres not described, it was obviously held that as the covenant of warranty did not extend to the undivided twenty acres, the grantor was not estopped to assert an after-acquired title thereto. Gill *v.* Grand Tower Mining Co., 92 Ill. 249.

[1] Hanrick *v.* Patrick, 119 U. S. 156.

[2] See *supra*, § 42 *et seq.*

[3] Fox *v.* Widgery, 4 Greenl. (Me.) 218; Allen *v.* Sayward, 5 id. 231; Doane *v.* Willcutt, 5 Gray, (Mass.) 333.

[4] Goodel *v.* Bennett, 22 Wis. 565. In this case it seems that the defendant, in 1851, conveyed the premises in question with covenants for seisin, of warranty, and against incumbrances, and by virtue of several mesne conveyances they became vested in Chicks, who, by the treaty of February 5, 1856 (11 U. S. Stat. 664), ceded them to the United States. In 1860 a patent was issued to Davids, who conveyed to the defendant. Chicks having died, his administrator in 1862 sold the property to the plaintiff, and the court clearly held that ejectment could not be maintained. "The covenants ran with the land to the United States when it was ceded by Chicks under the treaty, and have thence passed by conveyance back to the defendant, and are thus extinguished. The plaintiff, by having taken a conveyance from an intermediate grantee after such grantee had parted with his title, is in no condition to insist upon an estoppel or that the subsequently acquired title of the defendant inures to his benefit."

[5] Thus in Comstock *v.* Smith, 13 Pick. (Mass.) 116, the tenant of one Waters purchased the premises by parol, and paid part of the purchase money. He was afterwards disseised by the demandants, who, pretending that they had a lawful title to the premises, subsequently sold them to the tenant. At the expiration of a year, the latter, finding that the demandants had no title, reconveyed to them all his "right, claim, and demand in and to the premises," and covenanted to warrant and defend them "against the lawful claims and demands of all persons claiming by or under him," and the demandant thereupon refunded the consideration money. The tenant subsequently, in pursuance of the parol contract, received a conveyance from Waters, who was the true owner, when the demandants brought a writ of entry against him, on the ground that the after-acquired title under the deed from Waters inured, by virtue of the covenant of warranty, to

applied where the covenants are restrained to certain particular

their benefit. But Wilde, J., who delivered the opinion, said: "The tenant's covenant is a restricted covenant, and is coextensive with the grant or release. He agrees to warrant the title granted or released, and nothing more. That title only he undertook to assert and defend. To extend the covenant further would be to reject or do away the restrictive words of it, and to enlarge it to a general covenant of warranty, against the manifest intention of both parties. The tenant, in covenanting to warrant and defend the granted or released premises, must be understood to refer to the estate or title sold or released, and not to the land, because he did not certainly intend to warrant any estate or title not intended to be conveyed. Now if Waters, after the tenant's quitclaim deed, had evicted the demandants, this would have been no breach of the tenant's covenant. Or if the tenant now held under Waters without having obtained the fee from him, he might pray Waters in aid, and thus defend himself against the title of the demandants, the title of Waters being, as the plea avers, the elder and better title, and this also would be no breach of the tenant's covenant. He did not undertake to convey to demandants an indefeasible estate, but only his own title; nor did he agree to warrant and defend it against all claims and demands, but only against those derived from himself, by which he must be understood to refer to existing claims or incumbrances, and not to any title which he might afterwards acquire by purchase or otherwise from a stranger. Ellis *v.* Welch, 6 Mass. 250. There is, therefore, no reason to be assigned why the tenant should not purchase the title of Waters. The demandants cannot thereby be prejudiced, nor ought they therefrom to derive any benefit.

"It was then contended by the demandants' counsel, that admitting the tenant is not estopped by his covenant of warranty, he is nevertheless estopped by his conveyance to deny that he had any title in the land at the time of the conveyance. This also is a well-established principle of common law. Co. Litt. 45, 47; Jackson *v.* Murray, 12 Johns. 201; Jackson *v.* Bull, 1 Johns. Cas. 91; Ischam *v.* Morrice, Cro. Car. 110. But the tenant, in his plea, does not deny that he had any title to the land; on the contrary, he avers that before the time of his conveyance he was in possession of the land under Waters, that afterwards the demandants disseised Waters, and being seised by disseisin they conveyed to the tenant all their right and title, with a covenant of warranty, similar to the one contained in his conveyance to them. The demandants, in their turn, would be estopped to aver that they had no title in the land, nor is there any such averment in the pleadings. The tenant at the time of his reconveyance might have had a valuable interest in the land by possession and improvements, although Waters had a paramount title. This interest, whatever it was, passed to the demandants by the tenant's deed, and it was all the title he had to convey, or was expected to convey. If under these circumstances the demandants could now acquire, without any consideration, another title by estoppel, we should be compelled to admit that estoppels are as odious as they are sometimes said to be. But the doctrine of estoppel aids much in the administration of justice; it becomes odious only when misunderstood and misapplied. Nothing can be more just than the doctrine of estoppel urged by the demandant's council, when applied to a conveyance with the general covenant of warranty; but to apply the doctrine to the tenant's restricted conveyance and covenant would be a manifest perversion of the principle upon which the doctrine is founded."

This decision was approved in Trull *v.* Eastman, 3 Met. (Mass.) 121, and similar decisions were made in Loomis *v.* Pingree, 43 Me. 314; Bell *v.* Twilight, 6 Fost. (N. H.) 401 (where is an elaborate opinion); Tillotson *v.* Kennedy, 5 Ala. 413; Chauvin *v.* Wagner, 18 Mo. 553; Western Mining and Manufacturing Co. *v.* Peytona Cannel Coal Co., 8 W. Va. 406, 450. In Doane *v.* Willcutt, 5 Gray, (Mass.) 329, an indenture of partition

claims, and the after-acquired title is derived from a source not thus specified in the covenants.[1]

Nor will a grantor be estopped from asserting a title subsequently acquired by himself by the disseisin of his grantee or those claiming under him, followed by adverse possession long enough to have barred the rights of a stranger.[2] So where the

was made between the plaintiff, defendant, and other persons, as tenants in common, wherein the parties, reciting their seisin in fee, mutually conveyed certain premises with a covenant "that each of the parties might enjoy the same in severalty, free and discharged of all right, title, interest, or claim whatever of them or either of them, or of any persons claiming from, by, or under them, or any of them" (for the effect of the words "by, from, or under," see *supra*, § 92 *et seq*). At the date of the partition, there was an outstanding title in third persons to the portion conveyed to the defendant, which the plaintiff subsequently purchased and asserted. It was contended on behalf of the defendant that the plaintiff could not set up this title in opposition to the deed of partition, but the court said, per Shaw, C. J. : "The recital of seisin cannot have greater force than a direct covenant of seisin which is not broken by the existence of an outstanding paramount title. It is a covenant that all the right, title, and interest which the plaintiff then had, together with a seisin *de facto* as against him, his heirs and assigns, passed to the defendant. But we think it does not estop him from now asserting, and maintaining by proof, that at the time of the partition a third party held an outstanding paramount title, superior to that of either of these parties, and that the plaintiff afterwards acquired that title, and now relies upon it as a good and valid title. It admits that he was then seised (not of an indefeasible title, but *de facto*), that all the interest he then had passed to the defendant, and that he became seised *de facto* as against the plaintiff, by force of the conveyance. Comstock *v.* Smith, 13 Pick. 116 ; Wight *v.* Shaw, 5 Cush. 56. This case is clearly distinguishable from that of a conveyance of land, with a general covenant of warranty against the lawful claims of all persons. There, if there be an outstanding title and the grantor with such warranty acquires such title, it inures, without further act, to the use of his grantee. . . . No such estoppel can be claimed under this deed of partition."

[1] Quivey *v.* Baker, 37 Cal. 471 ; Fields *v.* Squires, Dead. (C. C. U. S.) 366, 380 ; Lamb *v.* Kamm, 1 Sawy. (C. C. U. S.) 238 ; Lamb *v.* Wakefield, id. 251.

[2] Stearns *v.* Hendersass, 9 Cush. (Mass.) 497 ; Tilton *v.* Emery, 17 N. H. 536 ; Smith *v.* Montes, 11 Tex. 24 ; Hines *v.* Robinson, 57 Me. 330 ; Franklin *v.* Dorland, 28 Cal. 180 ; Johnson *v.* Farlow, 13 Ired. L. (N. C.) 84; Reynolds *v.* Cathens, 5 Jones L. (N. C.) 437; Eddleman *v.* Carpenter, 7 id. 616 ; Sherman *v.* Kane, 46 N. Y. Supr. Ct. 310. In Stearns *v.* Hendersass, *supra*, the defendant, in 1826, conveyed certain lands to one Blake, who conveyed to the plaintiff, and the latter brought a writ of entry. The defence set up was an adverse possession by the defendant from the date of his deed to the time of suit (1851), and the court held it to be a good defence. "The proposed defence," said the court, "does not impeach the deed to Blake. It admits its full force and effect as a valid deed, and concedes that at its date a good title passed to the grantee by virtue of it. The whole foundation of the defence rests on an after-acquired title by the tenant, or subsequent acts divesting the grantee of his interest in the premises. Full effect is given to the deed of the defendant to Blake, when it is held to vest the absolute title in Blake at its delivery, and that it estops the defendant from setting up any other title as then held adversely. The grantor, in such case, may show a subsequently acquired title from his grantee, and it is no answer to an alleged disseisin, or a bar by more

deed, by reason of its imperfect execution, is insufficient to pass the estate, there will, on the application of the same doctrine, viz. that there is no right of action, be no estoppel.[1] So, naturally, as has been already said, where the covenants have been released or extinguished.[2]

To create the estoppel, it is also considered necessary that the after-acquired estate should be held by the grantor *in the same right* as that in which his former conveyance was made. Thus where one conveys land in his own right with covenants for title, and subsequently acquires title thereto as trustee, the doctrine of estoppel is held not to apply,[3] and it is deemed immaterial whether, in the later conveyance to the former grantor, the trust is expressed or implied.[4]

than twenty years' adverse possession, that the disseisor, previous to his entry and the commencement of his adverse possession, fully acknowledged the title of the disseisee. Nor does the covenant of warranty in the deed to Blake estop him from setting up this defence, for it was a good title that was conveyed, and there was no breach of the covenant, and of course no ground for the estoppel against the defendant, by reason of the covenant." In Sherman *v.* Kane, *supra*, the rule was applied where the grantor had never parted with possession.

[1] Patterson *v.* Pease, 5 Ohio, 191; Wallace *v.* Miner, 6 id. 370; Kercheval *v.* Triplett, 1 A. K. Marsh. (Ky.) 493; Connor *v.* McMurray, 2 Allen, (Mass.) 204. In Dominick *v.* Michael, 4 Sandf. S. C. (N. Y.) 417, it was left undecided whether a covenant for further assurance in a void marriage settlement would estop a husband from a title, as tenant by the curtesy, acquired by reason of the settlement being void.

[2] Goodel *v.* Bennett, 22 Wis. 565, *supra*, p. 372, n. 4.

[3] Jackson *v.* Mills, 13 Johns. (N. Y.) 463; Sinclair *v.* Jackson, 8 Cow. (N. Y.) 587; Jackson *v.* Hoffman, 9 id. 271; Burchard *v.* Hubbard, 11 Ohio, 316; see also Buckingham *v.* Hanna, 2 Ohio St. 555, *infra*.

[4] Kelley *v.* Jenness, 50 Me. 455. In this case the defendant conveyed the premises in mortgage to the plaintiff's intestate with covenants of general warranty. At the time of this mortgage, a prior mortgage was outstanding, which was subsequently assigned to the defendant. It was, however, proved that this assignment, although absolute on its face, was, with the exception of a small sum, paid for with the money of Hill, to whom it was assigned by the defendant on the day of its purchase by the latter, and it was held that the assignment to the defendant did not inure as a payment for the benefit of the plaintiff, except as to the small amount paid by the defendant with his own money. "In the case," said Kent, J., who delivered the opinion of the court, "of Jackson *v.* Mills, 13 Johns. (N. Y.) 463, it was held where one took a deed merely as trustee for another although absolute in form, and the consideration was paid by the other, and thereupon he gave him a deed, that the latter deed was a mere execution of his trust, and did not operate as an estoppel to any title he might thereafter acquire in his own right to the same lands. The case of Jackson *v.* Hoffman, 9 Cowen, (N. Y.) 271, reaffirms the above case, and decides that estoppels do not apply, except between parties acting in the same character. In that case the purchase was made by one in his individual capacity, and the covenant was made by him as administrator. Sinclair *v.* Jackson, 8 Cowen, 565, sustains the same view, and the court say, 'For a conveyance to operate as an estoppel, it is necessary that

Such is considered, by a large class of American cases, to be the law of "estoppel by deed" as connected with the covenants for title.

§ 251. There are, however, at least four classes of cases, and possibly others, which, according to some of the same decisions, show that the doctrine of estoppel, as thus applied to passing an after-acquired interest, is not based, as the current of authorities would seem to found it, solely on the ground of avoiding circuity of action.

1. One, and the most important of these is, as will be hereafter shown,[1] where the question has arisen between the assignees of the original title and the assignees of that subsequently acquired; for as the former have, of course, no right of action against the latter, there can be no circuity of action.

2. The second is where a married woman in conveying her own land has joined with her husband in covenants for the title, and

it should be in the same right with the former one. To estop, a conveyance must be by one claiming under and in right of identically the same power and the same estate as he first conveyed.' [The learned judge was, however, mistaken in attributing to the court the remarks just quoted from Sinclair *v.* Jackson. They were used *arguendo* by the counsel for the defendant in error; see pp. 565, 566, of the report in 8 Cowen.] If, as we have seen in the case before us, Jenness took the assignment of the mortgage charged with a trust, it was not in the same character and of the same estate as in his deed to Kelley. He was here a mere trustee. There can be no division or separation in the effect of the assignment. He did not take a conveyance and afterwards have engrafted thereon a trust, allowing the legal estate to vest absolutely and for a time before any trust arose. The assignment was charged with the trust as soon as executed. Is a trust estate such an after-acquired title as will inure by way of estoppel? It would hardly be contended that a conveyance to one as trustee for the use and benefit of a charitable association, or a religious body, would thus inure. Nor where the conveyance creates a trust and declares it fully in the deed, and the purpose is to give the whole benefit of the estate to a party named and no personal benefit to the trustee. But an implied trust is equally a trust for the benefit of another as when the trust is declared in writing. It may require a different mode of proof to establish its existence, and it may be limited in case of purchasers without notice. But being established, it follows the general rules, and is subject to the doctrines applicable to trusts [citing Burchard *v.* Hubbard, 11 Ohio, 316, and other cases]. . . . These cases rest upon the general principle that the estate must be acquired by the warrantor in fact and substance as his own property, without intervening rights in third parties, and not as mere trustee for another's use, or as a mere conduit of title. Whilst the law is careful to see that an after-acquired title, purchased and paid for by the warrantor, shall inure, it is equally careful to guard against any unequitable result by enforcing the rule where the substance is wanting and the rights of others are impaired." To the same effect is the recent case of Gregory *v.* Peoples, 80 Va. 355. There, the after-acquired title was purchased with the money of another, and the court held that the resulting trust in his favor prevented the application of the doctrine of estoppel.

it is held that although she may not be liable in damages after his death, yet that the covenants will estop her and those claiming under her from setting up any claim to an after-acquired title.[1] This exception, however, has been by no means universally recognized,[2] and in some States such a result is prevented by statutory enactment.[3]

[1] Massie *v.* Sebastian, 4 Bibb, (Ky.) 436; Fowler *v.* Shearer, 7 Mass. 21; Colcord *v.* Swan, id. 291; Nash *v.* Spofford, 10 Met. (Mass.) 192; Doane *v.* Willcutt, 5 Gray, (Mass.) 332; Hill *v.* West, 8 Ohio, 226. "These decisions," it was said in Hill's Lessee *v.* West, "may not seem to be founded upon the reasons which are usually assigned why the covenants in a deed should operate by way of estoppel, that is, to prevent circuity of action; still they seem to us to be reasonable, and such as tend to the furtherance of justice; and when a married woman undertakes, in conjunction with her husband, to convey her land with covenants of warranty, it is sufficient to protect her from the payment of damages for the breach of those covenants; for all other purposes they should be held operative. If, then, after the execution of the deed to the lessor of the plaintiff, [the married women who joined with their husbands in the deed] acquired title to the premises in controversy, that title inured to the benefit of the lessor of the plaintiff, and neither they nor those claiming under them shall be permitted to defeat the plaintiff by setting up this after-acquired title." To the same effect are King *v.* Rea, 56 Ind. 1; Beal *v.* Beal, 79 id. 280; Knight *v.* Thayer, 125 Mass. 25; Barker *v.* Circle, 60 Mo. 258. And in Fletcher *v.* Coleman, 2 Head, (Tenn.) 384, the court seems to have approved of these decisions, although the case was decided upon another ground. In Graham *v.* Meek, 1 Ore. 328, a married woman was held to be estopped by a deed without covenants. *Infra*, Ch. XIII.

[2] Gonzales *v.* Hukil, 49 Ala. 260; Shumaker *v.* Johnson, 35 Ind. 33; Thompson *v.* Merrill, 58 Io. 419; Hobbs *v.* King, 2 Met. (Ky.) 141; Nunnally *v.* White, 3 id. 593; Hempstead *v.* Easton, 33 Mo. 142; Wadleigh *v.* Glines, 6 N. H. 18; Den d. Hopper *v.* Demarest, 1 Zabr. (N. J.) 541; Martin *v.* Dwelly, 6 Wend. (N. Y.) 14; Carpenter *v.* Schermerhorn, 2 Barb. Ch. (N. Y.) 314; Dominick *v.* Michael, 4 Sandf. S. C. (N. Y.) 424; Grout *v.* Townsend, 2 Hill, (N. Y.) 557; Edwards *v.* Davenport, 4 McCr.)C. C. U. S.) 34. In Wight *v.* Shaw, 5 Cush. (Mass.) 65, though the question was left undecided, the court strongly inclined to the opinion that there would be no estoppel, and in Lowell *v.* Daniels, 2 Gray, (Mass.) 168, it was distinctly held that a married woman who executed a deed of her real estate with covenants of warranty bearing date previously to the marriage by the name which she then bore, with the fraudulent purpose of imposing upon some person to be affected by it and without disclosing the fact of her marriage, did not thereby estop herself and her heirs to set up her title in the land as against her grantee, or against a purchaser from him without notice. See *infra*, Ch. XIII. Wilson *v.* King, 23 N. J. Eq. 150, was the case of a joinder by a married woman, resident in New York, in a conveyance with covenant against incumbrances of her husband's property in New Jersey, and the court held that as the covenant was personal, it did not affect a mortgage created by the husband before the conveyance and assigned afterward to the wife.

[3] Thus in Virginia, the Revised Code of 1849 declared that "a privy examination of the wife shall operate to pass the right of dower, and all right and interest of every nature which at the date of such writing she may have, but such writing shall not operate any further upon the wife or her representatives by means of any covenant of warranty contained therein." This was taken in substance from a prior act re-enacted in 1819 (and was doubtless owing to the decision in Nelson *v.* Harwood, 3 Call, 394, *infra*, Ch. XIII.), and similar enactments prevail in

Where, however, the conveyance only purports to pass the land of the husband, and the wife merely joins to bar her dower, a title subsequently acquired by her to the same lands will not inure to the benefit of the former grantee.[1] In such case, she is neither bound by the covenants in the deed nor estopped beyond her interest at the time of the conveyance.[2]

3. Another exception to the doctrine that the estoppel is based on the ground of avoiding circuity of action, is in the case of the grant by a State, which though of course not liable to an action on the covenants, is yet held to be bound by the estoppel arising therefrom to the same extent as an individual.[3]

4. The fourth exception is where the covenantor has been adjudged a bankrupt, and it is held that although his discharge in bankruptcy may be a release from all personal liability on his contracts,[4] yet the estoppel created by his covenants for title still operates upon the estate.[5]

the States of Delaware, Illinois, Indiana, Michigan, Missouri, and Oregon. See, as to Missouri, Chauvin *v.* Wagner, 18 Mo. 542, *infra*, Ch. XIII.

[1] Strawn *v.* Strawn, 50 Ill. 33; Schaffner *v.* Grutzmacher, 6 Io. 137; Childs *v.* McChesney, 20 id. 431; O'Neil *v.* Vanderburg, 25 id. 104; Raymond *v.* Holden, 2 Cush. (Mass.) 270; Jackson *v.* Vanderheyden, 17 Johns. (N.Y.) 167.

Griffin *v.* Sheffield, 38 Miss. 359.

[3] Magee *v.* Hallett, 22 Ala. 718; Nieto *v.* Carpenter, 7 Cal. 527; Commonwealth *v.* Pejepscut, 10 Mass. 155; Commonwealth *v.* Andre, 3 Pick. (Mass.) 224; Denn *v.* Cornell, 3 Johns. Cas. (N. Y.) 174; People *v.* Society, 2 Paine, (C. C. U. S.) 557; Carver *v.* Jackson, 4 Pet. (S. C. U. S.) 87; Menard *v.* Massey, 8 How. (S. C. U. S.) 313.

In North Carolina, however, a contrary doctrine prevails, and it is there held that a State cannot be estopped. Taylor *v.* Shufford, 4 Hawks, 116; Candler *v.* Lunsford, 4 Dev. & Bat. 407; Wallace *v.* Maxwell, 10 Ired. 112. "The sovereign power," said Henderson, J., in delivering the opinion in Taylor *v.* Shufford, "conveys neither by feoffment, bargain and sale, or any conveyance dependent upon livery of seisin or transferring uses into possession. By grant, the sovereign will alone passes the property evidenced by matter of record, and I know of no case where the sovereign power has been estopped."

[4] *Infra*, Ch. XIII.

[5] Stewart *v.* Anderson, 10 Ala. 510; Dorsey *v.* Gassaway, 2 Harr. & Johns. (Md.) 411; Bush *v.* Cooper, 26 Miss. 599, affirmed 18 How. (S. C. U. S.) 82; Chamberlain *v.* Meeder, 16 N. H. 384; Gregory *v.* Peoples, 80 Va. 355. In Bush *v.* Cooper, *supra*, when in the Supreme Court of the United States, Curtis, J., in delivering the opinion of the court, referred to the Mississippi statute which gave to the words "grant, bargain, and sell" the effects of certain covenants for title (as to which see *infra*, Ch. XII.), and said: "The argument on the part of the appellant is that under the fourth section of the bankrupt act he is discharged from all debts, contracts, and other engagements provable under the act; that not only the debt secured by this mortgage, but the covenant of warranty itself, was provable under the act, and consequently, the covenantor being released from the covenant, it could no longer have the operation allowed to it by the courts of Mississippi. It must be admitted that if the covenantee or his assignee had released the covenant, it would be difficult to maintain that it could continue in existence for any

5. Another exception, not perhaps sufficiently established to be considered as of general application, has been recognized in Massachusetts at least; namely, that although all right of action on the covenants may have been barred by the statute of limitations, yet as the covenants themselves are still subsisting, they will operate to transfer an after-acquired title to a former grantee.[1]

From these exceptions, four of them well settled, it would seem that the doctrine does *not* rest upon that of avoiding circuity of action, but that the estoppel is held effective where no right of action whatever exists upon any covenant.[2]

purpose. But it must be considered that whatever discharge has taken place in this case is by force of a statute, which may have so qualified and limited its effect as still to leave the covenant in existence for one purpose, though not for others." And then, after referring to the bankrupt act, the opinion went on to say: "It is, therefore, obvious that though the bankrupt personally was released by the act, the debt due from the land continued undischarged. In this particular, beyond all doubt, the discharge by the act differed from a release by the creditor; since if the latter had released the debtor, the mortgage would thereby have been satisfied, and the charge on the land destroyed. . . . Nor is there any incongruity with established principles in holding that the personal discharge of the debtor does not free him from the estoppel. If this obligation could rest upon a covenant effectual in law to charge the grantor in a personal action, it would follow that when such personal liability was released by the bankrupt act the estoppel would naturally fall with it, and that an intention to preserve the estoppel ought to be clearly indicated, to induce the court to say it was not destroyed; but such estoppels do not depend on personal liability for damages. This is apparent when we remember that estoppels bind not only parties, but privies in blood and estate, though not personally liable on the covenants creating the estoppel. . . . Indeed, it is the settled doctrine of this court not only that no existing personal liability is necessary to work an estoppel, but that none need have existed at any time." And the learned judge then referred to the case of Van Rensselaer *v.* Kearney, 11 How. 322, *infra*, § 255, as having been decided "after great consideration and a close examination of the authorities."

[1] Cole *v.* Raymond, 9 Gray, 217. "It is no answer to this," (that the subsequent estate passed by estoppel,) said Shaw, C. J., who delivered the opinion, "that an action has been brought on the covenant of warranty and held to be barred by the statute of limitations. Holden *v.* Fletcher, 6 Cush. 235. A covenant of warranty in a deed of conveyance of land, whilst it is a covenant real and runs with the land and binds the grantor and his heir by its force as a covenant real, is also a personal covenant, and if a breach occurs in the lifetime of the warrantor, an action will lie against him to recover damages; or if a breach occurs before the final settlement of the estate, an action will lie against his personal representatives. When the covenant is thus treated as a personal contract and sought to be enforced as such by personal action, it must be treated in all respects as a personal obligation; the usual incidents to the conduct of a personal action will be applied. But this will not affect the covenant real in its broader application."

[2] To these, Mr. Bigelow (Estoppel, 4th ed. 436) adds a sixth exception, where the consideration of the grant with warranty was natural love and affection only; citing Robinson *v.* Douthit, 64 Tex. 101, as the authority for it. That case, however, did not hold that there could be no action on the covenants in a conveyance whose consideration was natural love and affection, but only that there could be no action for *the sum paid* in such a case, because

§ 252. But as the presence of covenants seems largely to lie at the base of the doctrine, it remains to consider, —

Secondly, what covenants for title will or will not produce this effect of estoppel.

In most of the States, it is held that the presence of a covenant of general warranty in a conveyance will not only estop the grantor and his heirs from setting up an after-acquired title, but will, by force of the covenant, have the effect of *actually transferring the estate* subsequently obtained, as if it had originally passed by the deed.[1]

none was paid; and it also held such a consideration "sufficient to give effect to the covenants in the deed."

[1] Kennedy *v.* McCartney, 4 Port. (Ala.) 141; Hoyt *v.* Dimon, 5 Day, (Conn.) 479; Dudley *v.* Cadwell, 19 Conn. 226; Rigg *v.* Cook, 4 Gilm. (Ill.) 348; Jones *v.* King, 25 Ill. 384; Gochenour *v.* Mowry, 33 id. 333; Thomas *v.* Stickle, 32 Io. 72; Massie *v.* Sebastian, 4 Bibb, (Ky.) 436; Logan *v.* Steele, 4 T. B. Mon. (Ky.) 433; Dickerson *v.* Talbot, 14 B. Mon. (Ky.) 65; Lawry *v.* Williams, 13 Me. 281; Baxter *v.* Bradbury, 20 id. 260; Pike *v.* Galvin, 29 id. 183; Williams *v.* Thurlow, 31 id. 395; Somes *v.* Skinner, 3 Pick. (Mass.) 52; Comstock *v.* Smith, 13 id. 116; Ruggles *v.* Barton, 13 Gray, (Mass.) 506; Kimball *v.* Blaisdell, 5 N. H. 533; Wark *v.* Willard, 13 id. 389; Thorndike *v.* Norris, 4 Fost. (N. H.) 454; Jewell *v.* Porter, 11 id. 39; Kimball *v.* Schoff, 40 N. H. 190; Moore *v.* Rake, 2 Dutch. (N. J.) 574; Jackson *v.* Winslow, 9 Cow. (N. Y.) 18; Jackson *v.* Bradford, 4 Wend. (N. Y.) 622; Sparrow *v.* Kingman, 1 Comst. (N. Y.) 246; Rathbun *v.* Rathbun, 6 Barb. (N. Y.) 107; Wellborn *v.* Finley, 7 Jones L. (N.C.) 228; the Pennsylvania cases are noticed *infra*, p. 409 *et seq.*; Davis *v.* Keller, 5 Rich. Eq. (S. C.) 434; Harrison *v.* Boring, 44 Tex. 255; Middlebury College *v.* Cheney, 1 Verm. 349; Blake *v.* Tucker, 12 id. 44. In Foss *v.* Strachn, 42 N. H. 40, it was held that the mortgagor of an estate of homestead, who had minor children living at the time of the mortgage, was estopped by the covenants of warranty therein contained from claiming any estate in the premises conveyed, and in Strachn *v.* Foss, id. 43, the minor children were also held to be estopped during the lifetime of their father. In both of these cases, the mortgage was given to secure a debt which existed before the homestead right accrued, but this the court considered as immaterial. The contrary has, however, been since decided in Doyle *v.* Coburn, 6 Allen, (Mass.) 71.

The doctrine of this class of cases is thus stated in a late case: "It is a well-settled principle of the common law, that if one conveys lands, or other real estate, with a covenant of general warranty against all lawful claims and demands, he cannot be allowed to set up, against his grantee or those claiming under him, any title he himself may subsequently acquire from another by purchase or otherwise. Such new title will inure by way of estoppel to the use and benefit of his grantee, his heirs or assigns." Jones *v.* King, 25 Ill. 384. It is submitted that the objection to this statement of the law is that the doctrine is *not* "a well-settled principle of the common law," but purely an equitable one, which has unconsciously been administered by the courts, in the cases referred to, through the medium of common law forms. See *infra*, § 265 *et seq.*

The conclusions to which this class of cases tend and the authorities generally relied upon in our courts are thus stated by Walworth, Ch., in Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 567: "By the common law, if a grantor who had no interest, or only a defeasible interest in the premises granted, conveyed the premises with warranty, and afterwards obtained an absolute title to the property,

There are, however, some qualifications to this. Thus it seems that the warranty implied from a partition[1] will not have the same operation as the express covenant in passing an after-acquired title.[2] Nor will this result be caused when there are mutual estoppels, for "estoppel against estoppel doth put the mat-

such title immediately became vested in the grantee or his heirs or assigns, by estoppel. Co. Litt. 265 *a*. And if the grantor, or any one claiming title from him subsequent to such grant, sought to recover the premises by virtue of such after-acquired title, the original grantee or his heirs or assigns, by virtue of the warranty which ran with the title to the land, might plead such warranty, by way of rebutter or estoppel, as an absolute bar to the claim. Co. Litt. 365 *a;* Termes de la Ley, tit. Guaranty; Toml. Law Dict. art. Rebutter. This principle has been applied to all suits brought by persons bound by the warranty or estoppel, against the grantee or his heirs or assigns, so as to give the grantee and those claiming under him the same right to the premises as if the subsequently acquired title or interest therein had been actually vested in the grantor at the time of the original conveyance from him with warranty, where the covenant of warranty was in full force at the time when such subsequent title was acquired by the grantor. Jackson *v.* Wright, 14 Johns. 193; Brown *v.* M'Cormick, 6 Watts, 64; Comstock *v.* Smith, 13 Pick. 119. And where an estoppel runs with the land, it operates upon the title, so as actually to alter the interest in it, in the hands of the heir or assigns of the person bound by the estoppel as well as in the hands of such person himself. Thus if a man by deed indented make a lease of land, reserving rent, which implies a warranty on the part of the lessor, and the landlord has no interest in the land at the time of the execution of the lease, if he afterwards purchases the land, and then sells it to a stranger, the latter will hold it subject to the lease; and coming in as the assignee, or grantee, of the person who made the lease, will be estopped from showing that the lessor had no interest in the land at the time he made such lease. 1 Co. Litt. (19th Lond. ed.) 47, note 11; 7 Bac. Abr. Warranty, L; Bull *v.* Wiott, 1 Roll. Abr. 868; Somes *v.* Skinner, 3 Pick. 52; Trevivan *v.* Lawrence, 5 Mod. 258. For as a covenant of warranty runs with the lands, so as to give the heirs and assigns of the grantee the benefit of the estoppel as against the warrantor, it runs with the subsequently acquired interest of the warrantor, in the hands of the heirs and assigns of the latter, so as to bind that interest by the estoppel, as against any person claiming the same under him *in the post.*"

If, as it will be attempted to show hereafter, the real doctrine involved is equitable and not legal, it seems the more remarkable that this language should have been used by a Chancellor.

[1] *Infra*, Ch. XII.

[2] In Rector *v.* Waugh, 17 Mo. 13, the application of the doctrine of estoppel to cases of warranty in a partition was said to be "very harsh in its operation. A number of proprietors of a town, supposing that they have a title to the land on which the town is laid off, make an equal partition of the lots amongst themselves, and mutually convey with warranty. The entire title to the land, which is the subject of partition, afterwards fails. If the matter ended here, it would not be maintained that any one of the proprietors had a cause of action against the others, as what he recovered on his warranty he in turn would be compelled to refund to him from whom he had recovered on the warranty he had given. . . . After the failure of the first title, one or more of the proprietors acquire a new and distinct title to the land on which the town was laid off, and a former proprietor, who has neither contributed nor offered to contribute anything towards the acquisition of the new title, lays claim to all the lots conveyed to him by the deed of partition. The common law implied no warranty when partition was made between joint tenants and tenants in common.

ter at large."[1] So it has been said in Alabama, that the general rule only applies where the vendor had no valid title at the time of executing the deed, and not where he is inhibited from selling, by the letter, spirit, or policy of a legislative act.[2] And it was held in a later case in the same State that a covinous deed from father to son, with warranty, would not pass to the son the after-acquired title by estoppel as against the creditors of the father.[3]

In Illinois and Wisconsin, the covenant for further assurance,

Indeed, by the common law, partition was not compellable among them. The warranty was only implied on partition among coparceners, and only extended to the land which was the subject of the partition. The doctrine which makes an outstanding title, bought in by one joint tenant or tenant in common, inure to the benefit of his co-tenants, it seems, is one of equitable cognizance, and courts of equity would mould and apply it so as to do justice among the tenants. Van Horne *v.* Fonda, 5 Johns. Ch. 388." The case itself was decided on the ground that the conveyance having omitted the word *heirs*, a life estate only passed to the grantee, and that the warranty was only coextensive with the estate to which it was annexed (see *infra*, p. 391, n. 2), the court saying, "We feel no reluctance in answering a technical action with a technical objection." In Woodbridge *v.* Banning, 14 Ohio St. 328, a devisee instituted proceedings to establish the will of the testator. Pending these, a partition was had between all the heirs at law of the testator, of whom the devisee was one, and it was held that, when the will was finally established, he was not estopped by the partition from claiming as devisee. The case, however, was decided without reference to the warranty implied from partition, as this doctrine escaped the attention of the court. "Had it been otherwise, the reasons given for the decision would probably have been modified, but the decision would have been the same." Walker *v.* Hall, 15 id. 363. In this last case, lands of a husband were sold at sheriff's sale, and finally became vested in the wife's father, and a partition being had between the devisees of the latter, to which the wife was a party, it was held that she was not thereby estopped on the death of her husband from claiming her dower in the lands. See the opinion of the court, *infra*, Ch. XII.

In the recent case of Rountree *v.* Denson, 59 Wis. 522, a tenant in common, who had previously conveyed away his interest, made partition with *express* covenants, and afterwards reacquired title to the moiety he had formerly parted with, but was held to be estopped from setting up this new title as against his co-tenant.

[1] Co. Litt. 352 *b* (*l.*); Illinois Land Co. *v.* Bonner, 91 Ill. 114; Brown *v.* Staples, 28 Me. 503; Wheelock *v.* Henshaw, 19 Pick. (Mass.) 345; Carpenter *v.* Thompson, 3 N. H. 204; Kimball *v.* Schoff, 40 id. 190; Pugh *v.* Mays, 60 Tex. 191. In Hobbs *v.* King, 2 Met. (Ky.) 140, this doctrine was sought to be applied to a case in which A. and his wife conveyed to B., who reconveyed to them, and they again conveyed to C., all the deeds containing covenants of general warranty. C. was evicted by paramount title, and sued B. upon the covenant of warranty contained in the deed of the latter to A. and wife. But the court held that while the wife of A., being a married woman, was not liable on the covenants in the deed to B., yet as she had by statute no power "to convey and pass over her estate," the benefit of the covenants in the reconveyance by B. passed at once to her grantee, and the estoppels therefore were not mutual.

[2] Kennedy *v.* M'Cartney, 4 Port. (Ala.) 158; see as to this, *supra*, § 47 *et seq.*

[3] Stokes *v.* Jones, 21 Ala. 738 (and see s. c. 18 id. 734).

when it is the only covenant in the deed, has been considered as effective for the purpose of estoppel as the covenant of warranty,[1] but in Missouri and Minnesota it has been held that a covenant for further assurance merely creates an equity in favor of the grantee, which is enforceable as to the after-acquired title against the grantor or his heirs.[2]

In New Hampshire, Mississippi, and the Province of Ontario, it has been decided that when the covenants are those of good right to convey and for quiet enjoyment, a title subsequently acquired will pass;[3] and in a case in the Supreme Court of the

[1] Bennett *v.* Waller, 23 Ill. 183; Pierce *v.* Milwaukee R. R., 24 Wis. 553. In the former case the court say: "If the deed be but a quitclaim deed, it contains a covenant for further assurances; under this covenant a subsequent title inures as well as under a covenant of warranty. The reason why a subsequently acquired title is held to pass by a deed containing covenants of warranty is, that it effectuates the real intent of the parties, which was to convey the true and real title to the land, and to avoid circuity of action and further litigation. It is a principle of equitable jurisprudence adopted by the courts of law, and by them engrafted into the common law itself, and has been sanctioned by our statute. The same reasoning applies in the same terms and with equal force where the deed contains a deed [covenant] for further assurances as where it contains a covenant of warranty."

[2] Hope *v.* Stone, 10 Minn. 141; Chauvin *v.* Wagner, 18 Mo. 531. See also Smith *v.* Baker, 1 Younge & Coll. Ch. 223, and *infra*, §§ 262, 265.

[3] Foss *v.* Strachn, 42 N. H. 40; Wightman *v.* Reynolds, 24 Miss. 675. In the latter case, Wightman and Anderson, as trustees of the town of Aberdeen, conveyed the premises in question to Gholson, with the following covenants: "And the said trustees, parties of the first part, for themselves and their successors, covenant with the party of the second part that they have full right to convey said premises by virtue of a deed made to us by Robert Gordon and James Davis, and further, that the said premises are not nor shall be embarrassed by any acts of our own." "By this covenant," said Fisher, J., who delivered the opinion, "Wightman not only admitted that he had a good title to the premises at the date of the deed, but he thereby precluded himself from acquiring any title in future which could, in any manner, embarrass the title conveyed, or the rights of his vendee under the same. . . . Wightman, whose title or right of possession is now set up in the defence, could not, after his deed, acquire any right whatever from any third party; he could in future only become interested in the lots by contracting with Gholson, his vendee, or with a person deriving title from Gholson. A title acquired from any other source would give him [Wightman] no rights whatever in the premises; but it would only enable him to perform in the true spirit the covenant in his deed, and such title would inure to the benefit of his vendee." It will be observed that the conveyance was made by the plaintiff as trustee, and the subsequent title was acquired in his own right, (*supra*, p. 375,) but the case was decided without reference to this point.

"For upwards of forty years," said Strong, J., in Trust and Loan Co. *v.* Ruttan, 1 Duval, (Canada,) 564, "it has been held in Upper Canada that covenants for title, especially the usual covenant that the granting party is seised in fee at the date of the deed, a covenant which this deed contains in the absolute not in the restricted form, are as effectual in working an estoppel as a recital to the same effect would have been;" citing Doe d. Hennesey *v.* Myers, 2 U. Can. Q. B. (o. s.) 424; Doe d. Irvine *v.* Webster, 2 U. Can. Q. B. 224;

United States, where the covenants were for seisin and of good right to convey, the court referred to the general rule, though the point was not directly decided.[1]

§ 253. It has, as we have seen,[2] been decided in Maine that the covenant of non-claim will create no estoppel, either when standing alone,[3] or when joined with a covenant against incum-

McLean *v.* Laidlaw, id., 222. This is, however, very different from announcing that the estoppel operates to *actually transfer* the estate.

[1] Irvine *v.* Irvine, 9 Wall. (S. C. U. S.) 618. "It is a general rule," said Strong, J., in delivering the opinion, "that when one makes a deed of land, covenanting that he is the owner, and subsequently acquires an outstanding and adverse title, his new acquisition inures to the benefit of his grantee on the principle of estoppel. As the deed of the plaintiff in this case contained an assertion that he was well seised in fee and had good right to sell and convey in fee, it would not be difficult, were it necessary, to show that in taking the patent he was in law acting for his grantee. But it is not necessary to rely upon that principle. The evidence in the case was, that prior to his deed to the defendant, to wit, on the 21st of February, 1849, he had bought the land from the government and had paid all the purchase money. The patent subsequently given to him was, therefore, not a new acquisition of title. It was only a confirmation of the right which he had acquired before the deed was made." This case is one of a class as to title subsequently inuring by patent from the government. See *supra*, p. 367, n.

The cases in the New England States, which hold that no estoppel will be created by the covenants for seisin and of good right to convey, when those covenants are satisfied by the transfer of a tortious seisin, have already been referred to. *Supra*, § 42 *et seq.*; Allen *v.* Sayward, 5 Greenl. (Me.) 227.

[2] *Supra*, p. 370.

[3] Pike *v.* Galvin, 29 Me. 185 (overruling Fairbanks *v.* Williamson, 7 Greenl. 97; see the dissenting opinion of Mr. Justice Wells, 30 Me. 539; and see Ham *v.* Ham, 14 id. 355, where Fairbanks *v.* Williamson was virtually denied); Partridge *v.* Patten, 33 id. 483; Loomis *v.* Pingree, 43 id. 314; Harriman *v.* Gray, 49 id. 538. Pike *v.* Galvin was a striking illustration of the extent to which the doctrine of estoppel may lead. Ward, being the owner of certain premises, agreed in 1820 by articles to convey them to Jellison, who entered into possession, but who did not, it seems, comply with the condition of the articles, and in 1823 assigned the contract to the plaintiff, and on the same day executed to him a release of the premises, containing a covenant of non-claim. In 1825, Ward conveyed the premises, *inter alia*, to Dyer, who in 1829 conveyed them to Jellison. Jellison, in 1833, conveyed them to the landlord of the defendants. All these conveyances were on record. Jellison and those claiming under him had always been in possession, the plaintiff never having had the possession. Under these circumstances, the plaintiff claimed that by virtue of the release with covenant of non-claim from Jellison to himself in 1823, the title acquired in 1829 inured to his benefit; but the court held (Wells, J., dissenting) that inasmuch as the release contained no covenant of warranty, but only a covenant of non-claim, the doctrine of estoppel could not apply. The covenant could not operate in favor of the plaintiff, it was said, "by way of estoppel, to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one who has in such a solemn

brances;[1] but this construction has not been generally adopted, it being usually considered as synonymous with the covenant of warranty.[2]

Whether the statutory covenants implied from the words "grant, bargain, and sell" will operate as an estoppel does not seem to be consistently settled. In Illinois, where those words are declared to be express covenants for seisin, against incum-

manner admitted a matter to be true, to allege it to be false. 'This,' says Kent, 'is the reason and foundation of the doctrine of estoppels.' 4 Kent's Comm. 261, note *d*, where he also says, 'A release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel and not otherwise.' The covenant of non-claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct."

It is difficult, however, to imagine how a more solemn assertion could have been made than was contained in the covenant referred to, which was, "so that neither I, the said Jellison, nor my heirs, or any other person claiming from or under me or them, or in the name, right, and stead of me or them, shall, or will by any way or means, have, claim, or demand any right or title to the aforesaid premises or to any part or parcel thereof forever." The decision of the case was perfectly correct upon the facts, as under the registry acts Jellison's grantee in 1833 was not bound to search the record for conveyances by him prior to 1829, when Dyer had conveyed to him; and the application of the doctrine of estoppel would have been opposed to the theory of these statutes. At the same time, it is difficult to support the authority of the case upon the principles so well settled in New England; and it even became necessary to overrule some prior decisions in the same State with respect to the covenant of non-claim which had been there recognized as law for nearly twenty years, and had been elsewhere approved. Wells, J., in his dissenting opinion (published in 30 Me. 539), adhered however to the law as adopted generally in the Northern States, and was of opinion that the plaintiff was entitled to recover. In the subsequent case of Curtis *v.* Curtis, 40 Me. 24, the facts were, however, much the same as those in Trull *v.* Eastman, 3 Met. 121. One of several sons released in his father's lifetime all his present and future claim in his estate, with a covenant that neither he nor any one through him should ever claim any right to the same, and it was held that this precluded him from bringing proceedings for partition after his father's death. In the later case of Loomis *v.* Pingree, 43 Me. 314, it was said that "the decision in Pike *v.* Galvin having been made more than nine years, whatever may be said on the one side or the other, the interest and peace of the community require that we should abide by it." It is somewhat singular that in Pike *v.* Galvin neither the counsel nor the court should have noticed the decision in Jackson *v.* Bradford, 4 Wend. (N. Y.) 622, where the Supreme Court of New York had, in order to avoid an embarrassing result necessarily following from the application of the doctrine of estoppel as held in the class of cases just cited, been also obliged to make the same decision as was pronounced in Pike *v.* Galvin. An expectant heir conveyed property with a covenant of non-claim, and afterwards the estate which he had purported to convey devolved upon him and was levied upon and sold by a judgment creditor, and it was held that the estate passed to the sheriff's vendee, and not, by estoppel, to the prior grantee, as the covenant was not one on which an action would lie.

[1] Sweetser *v.* Lowell, 33 Me. 452; Partridge *v.* Patten, id. 483.

[2] Trull *v.* Eastman, 3 Met. (Mass.) 121; Miller *v.* Ewing, 6 Cush. (Mass.) 34; and see *supra*, p. 150.

brances, and for quiet enjoyment,[1] they are held to pass an after-acquired title;[2] but in Missouri, where they are express covenants for seisin, against incumbrances, and for further assurance,[3] it has been said that "these covenants do not operate as the ancient common law warranty to transmit a subsequently acquired title to the covenantee."[4]

And the effect of estoppel has been given to other covenants than the technical covenants for title. Thus in Illinois, a covenant "that if at any time hereafter I shall acquire any further or additional title to the said lot of land, the same shall inure to [the grantees] in proportion to the interests hereby conveyed," was held to pass the after-acquired title as against a subsequent purchaser;[5] and in Alabama, where an heir at law who was sole devisee under his father's will covenanted with his co-heirs that the property should be distributed as though his father had died intestate, it was held that not only was he estopped from claiming the premises, but, by force of the covenant, the land at once passed to the other heirs.[6]

[1] Rev. Stats., 1845, § 11, p. 104; Gen. Stats., 1860, p. 85; Pub. Stats., 1883, p. 280.

[2] D'Wolf *v.* Haydn, 24 Ill. 525; King *v.* Gilson, 32 id. 352; Pratt *v.* Pratt, 96 id. 184.

[3] Rev. Stats., 1879, p. 110, § 675, *infra*, Ch. XII.

[4] Chauvin *v.* Wagner, 18 Mo. 531; Gibson *v.* Chouteau, 39 id. 566; Butcher *v.* Rogers, 60 id. 138. No reasons are given for this course of decision in either of these States, except that such a deed is in effect a mere quitclaim deed.

[5] Phelps *v.* Kellogg, 15 Ill. 132. "This," said Treat, C. J., in delivering the opinion, "is an express covenant that any title which the grantor shall afterwards receive shall inure to and be vested in the grantees. It is a covenant running with the land and binding on all persons deriving title through the grantor with notice of the deed. It concludes them from setting up title against the grantees and their assigns. . . . This deed was recorded long before the executrix of the grantor made the subsequent conveyance to Cole. The latter and those claiming under him had, therefore, full notice of the deed and the covenant in question, and are bound thereby."

It will be observed that the court seems to have assumed that the subsequent purchaser was affected with notice of the first deed from the fact of its being on record prior to the conveyance to him. It is, however, conceived to be the law that a purchaser is not bound to search for conveyances by his grantor before the commencement of the latter's title, and hence such a prior recorded deed, not being in the line of search, would not be notice. There appears, however, in this case to have been proof of possession by the plaintiffs, which might deprive the subsequent grantee of the protection afforded by the recording acts, by putting him on inquiry as to the title under which such possession was held; such inquiry would disclose the equity of the first grantee to a conveyance of his grantor's after-acquired title, and take the case out of the recording acts; *infra*, § 260.

[6] Bean *v.* Welsh, 17 Ala. 771. "The legal effect of this agreement," said the court, "was to vest in the heirs of the testator the same title they would have

§ 254. From this review of these numerous cases it will appear that they do not consistently agree either as to the grounds upon which they rest the estoppel,[1] or as to the covenants which will, or will not, produce the effect of estoppel.[2] And when the application of the doctrine itself is or may be in many cases fraught with such important practical consequences, we are bound to trace the doctrine to its source, for it is not less true in law than

taken had he died intestate as to the lands devised to the devisee, for we think the principle is well settled that an estoppel will not only bar a right or title, but will pass one to him in whose favor the estoppel works."

So in Wright *v.* Shumway, 1 Biss. (C. C. U. S.) 23. The defendants were, in 1850, in possession of unsurveyed public lands in Wisconsin, to which they had an inchoate right of pre-emption. To secure a debt due by them to the plaintiffs they executed a deed by which, in consideration of one dollar, they conveyed to the plaintiffs their interest in the lands, with a covenant that they would purchase them of the United States whenever the same should be surveyed and exposed for sale, and would mortgage them to the plaintiffs to secure so much of the debt as should then be unpaid. The deed was duly recorded. In 1852, the defendants purchased the lands from the United States and paid for them with money furnished by a third person, to whom they transferred the legal title as security. The priority of his lien was not in controversy. The plaintiffs, in 1853, filed a bill against the defendants, joining with them the holder of the legal title, to compel the execution of a mortgage or the sale of the land to pay the original debt which was still due. Upon entering a decree in accordance with the prayer of the bill, Miller, J., said: "The deed [to the plaintiffs] does not purport to be a mortgage of the fee, but nevertheless it may be valid. In equity, whatever property, real or personal, is capable of an absolute sale, may be the subject of a mortgage. . . . Courts of equity support assignments of, or contracts pledging, property or contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility. Mitchell *v.* Winslow, 2 Story, 630. If a mortgage be made of an estate to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a graft into the old stock, and as arising in consideration of the former title. Seabourne *v.* Powell, 2 Vern. 10; Best *v.* Meddlehurst, 3 Atkyns, 376; Goodright *v.* Meade, 3 Burrow, 1703; McGinnis *v.* Noble, 7 W. & S. 454. . . . By [the defendants'] express written agreement to make a mortgage, a lien is created on the land, in equity, on the principle that what has been agreed to be performed shall be performed. Houkey *v.* Vernon, 2 Cox, 12; 3 Powell on Mortgages, 1049, *a*, *b*. An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. The agreement in this case, to purchase the land and then to mortgage it, is express, and is a specific lien, which will be enforced in equity."

Here, however, it will be observed that the doctrine was expressly based upon *the equity* to a conveyance; not, that the title actually passed.

[1] That is to say, many cases hold that the doctrine rests purely on the ground of avoiding circuity of action, while there are as we have seen, at least four classes of cases which enforce the estoppel where there is no right of action at all, and hence, of course, no inducement to avoid circuity of action.

[2] That is, many of the cases deem that they follow the common law as to warranty when they apply the doctrine solely to a covenant of warranty, while, recently, nearly as large a class apply it in the case of the other covenants for title.

in logic that if we start with unsound premises, and reason logically, we must arrive at unsound conclusions, and although from its nature law is not and can never be one of the exact sciences, yet its greatest triumph — that which has earned for it the title of "the perfection of reason" — has been that its principles, logically applied, have never for any enduring space of time been suffered to work injustice in the daily affairs of life.

As to the source of the doctrine, there is little difficulty in tracing it, for most of the earlier and some of the later authorities agree that they base it upon one of Littleton's sections and Coke's commentary upon it. The passages are these. In section 446 of Littleton's treatise, he says, "No right passeth by a release but the right which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements, without clause of warranty, &c., and after the father dieth, &c., the son may lawfully enter upon the possession of the disseisor, for that he had no right in the land in his father's life, but the right descended to him after the release made by the death of his father." To which Coke adds, "If there be a warranty annexed to the release, then the son shall be barred. For albeit the release cannot bar the right for the cause aforesaid, yet the warranty may rebut, and bar him and his heirs of a future right which was not in him at that time; and the reason (which in all cases is to be sought out) wherefore a warranty being a covenant real should bar a future right, is *for avoiding of circuity of action*,[1] (which is not favored in law,) as he that made the warranty should recover the land against the terre-tenant, and he by force of the warranty to have as much in value against the same person."[2]

It will be observed that in the above passages the word "estoppel" is not employed,[3] nor does the doctrine seem to be thought

[1] As to this, the five classes of cases already referred to (*supra*, § 251) cannot claim to rest upon Coke as authority.

[2] Co. Litt. 265 *a*.

[3] The following sentence, from Co. Litt. 352 *a*, is often quoted in connection with them: "Privies in blood, as the heir, privies in estate, as the feoffee, lessee, etc., privies in law, as the lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law or *in the post*, shall be bound by and take advantage of estoppels." But no authority can be cited to show that a warranty, unaccompanied by a feoffment or fine, made by one who

in any way connected with the law of estoppel. The warranty was to operate by way of rebutter *to avoid circuity of action*, an effect far different from that of estoppel, for although Coke elsewhere speaks of rebutter as being "a kind of estoppel," [1] yet as has been said, this has reference merely to the ordinary and personal effect of an estoppel, and not to any higher effect of actually passing an estate. For if the law had been otherwise — if the interpretation which has been put upon the language of Littleton and his commentator were the true one — the whole system of feudal conveyances would have been deranged, and all distinctions between the common law modes of assurance would have been conveniently destroyed by the simple addition of a warranty.[2]

These passages in Littleton and Coke may perhaps be better understood by reference to one of the doctrines upon which warranty was based. It was one of its attributes that it required an estate to support it.[3] Such an estate was *created* by a feoffment, a fine, or a common recovery, the solemnity of which was such as to create and pass an estate, whether rightfully or wrongfully,[4] and therefore, as a penalty, if a tenant for life enfeoffed another in fee, he forfeited his life estate. To a *feoffment*, livery of seisin was necessary, but this livery could not be given unless the feoffor had the actual possession; and when this was the case, the delivery of the possession (of which the charter of feoffment was, in later times and when deeds had become common, merely the authentication) was an act of such notoriety as to pass an actual estate to the feoffee — an estate of fee simple if the feoffor so willed it.[5]

had no estate, to another who had no previous estate, possessed this quality of an estoppel.

[1] Co. Litt. 352 *b*.

[2] "If title could actually pass when subsequently acquired," says Mr. Bigelow (Estoppel, 4th ed., 431), "by the mere use of a warranty or other covenant, it would often be in the power of an heir to defeat the claims of the creditors of the ancestor. A conveyance with warranty made before the ancestor's death would, if not proved covinous, bring about this result."

[3] Seymor's case, 10 Rep. 96; Piatt *v.* Oliver, 3 McLean, (C. C. U. S.) 39; Kercheval *v.* Triplett, 1 A. K. Marsh. (Ky.) 495. In fact, a warranty unsupported by an estate would have been as anomalous as an estate in remainder without a particular estate to support it.

[4] Litt. §§ 599, 611; Co. Litt. 387 *a*, 367 *a*.

[5] "The formal delivery of the seisin or feudal possession which always took place in a feoffment, rendered it till recently an assurance of great power; so that if a person should have made a feoffment to another of an estate in fee simple, or of any other estate not warranted by his own interest in the lands, such a feoffment would have operated by wrong, as it is said, and would have conferred upon the feoffee the whole estate limited by the feoffment, along with the seisin actually

Such an estate could support a warranty. The same doctrine applied to a *fine*, which was of equal solemnity and notoriety as a feoffment and indeed always presupposed one, and which, moreover, divested all remainders and interests whatever except those limited after estates tail,[1] while as to *common recoveries*, their effect depended upon the fiction that he who by reason thereof lost his estate was recompensed by a recovery in value under the voucher to warranty.[2] When, therefore, one attempted to convey to a stranger land to which neither of them had a title, it was necessary to obtain the possession, and when this was done, although the feudal law and for feudal reasons declared that his feoffment should pass *an estate*, yet it was an estate subject to be divested by the lawful owner, and which was not assisted by the warranty, either by way of estoppel or otherwise; nor in fact had the warranty any operation whatever when the possession was wrongfully obtained, it being an inflexible rule that a warranty commencing by disseisin, and made for the purpose of giving effect to that disseisin, was void.[3]

delivered. Thus, if a tenant for his own life should have made a feoffment of the lands for an estate in fee simple, the feoffee would not merely have acquired an estate for the life of the feoffor, but would have become seised of an estate in fee simple by wrong." Williams on Real Prop. (9th ed.)

[1] The effect of a fine and the reason for it are clearly stated by Mr. Bigelow, (Estoppel, 4th ed., 409,) and he concludes by saying with entire accuracy: "We find no suggestion in the books that this effect of the fine in passing future estates arose otherwise than by virtue of the conveyance itself; and as the fine most commonly in use (that first mentioned) was simply a feoffment of record, it is but reasonable to presume that its operation by way of estoppel was the same as that of a feoffment. It was an acknowledgment in court on the part of the tenant that he had made livery of seisin to the cognizee; that is, that he had had possession of a freehold estate and had delivered it to the cognizee; and he and his privies were precluded by the record from disputing the fact."

[2] Taltarum's case, Year Book 12 Edw. IV. 19; Tudor's Lead. Cas. 605 (2d ed.); Pigott on Recoveries, 9; and see *supra*, § 9 *et seq.*

[3] "Warranty that commences by disseisin," says Littleton, § 698, "is in this manner; as where there is father and son, and the son purchaseth land, etc. and letteth the same land to his father for term of years, and the father by his deed thereof infeoffeth another in fee, and binds him and his heirs to warranty, and the father dies, whereby the warranty descends to the son, this warranty shall not bar the son; for notwithstanding this warranty the son may well enter into the land, or have an assize against the alienee if he will; because the warranty commenced by disseisin: for when the father, which had but an estate for a term of years, made a feoffment in fee, this was a disseisin to the son of the freehold which then was in the son. In the same manner it is, if the son letteth to the father the land to hold at will, and after the father maketh a feoffment with warranty, etc. And as it is said of the father, so it may be said of every other ancestor, etc. In the same manner is it, if tenant by *elegit*, tenant by statute merchant, or tenant by statute staple, make

Now neither a grant nor a release possessed the high qualities of a feoffment, a fine, or a common recovery.[1] A grant, as applied to corporeal hereditaments, passed estates in reversion or remainder,[2] while a release operated to relinquish an interest or claim to one already in possession. Neither of them possessed the power to create and transfer an actual estate where none previously existed. Nothing was better settled than that a warranty could not enlarge an estate,[3] and consequently it could not make valid that which would otherwise be invalid. Hence it followed that a grant, or a release with warranty, of a defeasible estate or no estate at all, to one having no previous interest therein, was as ineffectual as if it had contained no warranty. Had this been otherwise — had the effect of a warranty been to convey to a grantee or releasee any subsequently acquired estate — there would have been an end of the familiar common law rule that a future estate could not be barred by a mere deed to a stranger. If, however, the *grantee* or *releasee* had a previous interest or estate in the land, the warranty would knit itself to that, and having then something to support it, would rebut the warrantor and his heirs in the same manner as if the supporting estate had been created by a feoffment or fine.

a feoffment in fee with warranty, this shall not bar the heir which ought to have the land, because such warranties commence by disseisin." See also Co. Litt. 366 *b*, *et seq.*

[1] See the well-known argument of Mr. Knowler in Doe *v.* Whitehead, 2 Burr. 704. Also Bigelow on Estoppel (4th ed.), 414.

[2] Touchstone, 227, 228 ; 2 Prest. Conv. 209.

[3] Year Book, 44 Ass. 35 ; Co. Litt. 385 *b*; Seymor's Case, 10 Rep. 97. Nor, consequently, can the modern covenants for title. Patterson *v.* Moore, 15 Ark. 225 ; Hurd *v.* Cushing, 7 Pick. (Mass.) 169 ; Corbin *v.* Healy, 20 id. 514 ; Kendall *v.* Brown, 7 Gray, (Mass.) 212 ; Rector *v.* Waugh, 17 Mo. 27 ; Adams *v.* Ross, 1 Vroom, (N. J.) 509 (reversing s. c. 4 Dutch. 160) ; Den *v.* Forsythe, 3 Dev. (N. C.) 26 ; Den *v.* Young, 3 Ired. (N. C.) 379 ; Stell *v.* Barham, 87 N. C. 62 ; Phillips *v.* Thompson, 73 id. 543 ; Waugh *v.* Miller, 75 id. 127 ; Wright *v.* Herron, 5 Rich. Eq. (S. C.) 448 ; Lamb *v.* Wakefield, 1 Sawyer, (C. C. U. S.) 251. And hence it has been held that a conveyance which for want of the word "heirs" passes only a life estate, can neither be enlarged into a fee by the presence of a covenant of warranty to the grantee and his heirs, nor will such a covenant operate upon the latter by way of rebutter. Register *v.* Rowell, 3 Jones (N. C.) 312. In Shaw *v.* Galbraith, 7 Pa. 111, this latter point was, however, differently considered. See *infra*, p. 410, n. 1.

In Leech *v.* Schweder, L. R. 9 Ch. App. 463, it was held that in a lease for years a grant of "all lights, easements, advantages, and appurtenances whatsoever belonging or in any wise appertaining" to the premises, was not so enlarged by an ordinary covenant for quiet enjoyment as to entitle the covenantee to an injunction to restrain an obstruction where the damage was not sufficient to enable him to maintain an action at law.

By the application of these settled doctrines to the case put by Littleton, it will be seen that the release would *of itself* have had no operation whatever, and he expressly says so. The son having no estate, the release of course passed none. The reason why, in the case put by Coke, the warranty was effective was that *the releasee* had an estate — viz. an estate by his disseisin of the father — to which the warranty could attach itself, and that the father's estate had been reduced to a right of entry before the release with warranty was made. Had this not been so — had the father's estate still continued in him — the warranty would have been utterly void. Of the ten requisites necessary to give effect to a warranty, two were here essentially applicable; first, that the estate to be barred should have been divested and put to a right of entry before or when the warranty was made; and secondly, that the estate of the *warrantee* should have had a substantial existence before or at that time.[1] Both of these requisites existed in the case. For first, the estate of the father had been divested and put to a right of entry before the warranty made by the son; and secondly, the warrantee had a substantial interest or estate, though taking effect by disseisin only, at the time he received the warranty. If the releasee with warranty had been a stranger, of course he would have had no previous estate to which the warranty could be attached,

[1] "To every good warranty in deed that must bar and bind, these things are requisite. 1. That the person that doth warrant be a person able. . . . 2. That the warranty be made by deed. . . . 3. That there be some estate to which the warranty is annexed that may support it. . . . 4. That the estate to which the warranty is annexed *be such an estate as is able to support it.* . . . 5. That the warranty descend upon him that is heir of the whole blood by the common law to him that made the warranty. . . . 6. That he that is heir do continue to be so, and that neither the descent of the title nor the warranty be interrupted. . . . 7. That the estate of freehold that is to be barred *be put to a right* [*of entry or action*] *before or at the time of the warranty made*, and that he to whom the warranty doth descend have then but a right to the land, for a warranty will not bar any estate of freehold or inheritance *in esse*, in possession, reversion, or remainder, that is not displaced and put to a right before or at the time of the warranty made, though after [and] at the time of the descent of the warranty the estate of freehold or inheritance be displaced and divested. . . . 8. That the warranty doth take effect in [the] lifetime of the ancestor, and that he be bound by it, for the heir shall never be bound by an express warranty but where the ancestor was bound by the same warranty. . . . 9. That the heir claim in the same right that the ancestor doth. . . . 10. That the heir that is to be barred by the warranty be of full age at the time of the fall of the warranty." Touchstone, 186; Seymor's case, 10 Rep. 95 *b*; Tudor's Lead. Cas. on Real Property (3d ed.), 706.

and as the release only passed what estate the releasor had, (which was no estate at all, for his father, the lawful owner, was still living, though disseised,) and did not, like a feoffment, create an actual estate, the warranty would have been wholly inoperative.[1] If the mere addition of a warranty could have produced the effect supposed to have been attributed to it, if estoppel and warranty had been as identical as they are supposed to be, and "if the interest when it accrued fed the warranty," all distinction, as has been already said, between the common law modes of assurance would have been conveniently overcome by the simple addition of a warranty ; future estates could have been transferred to a stranger without the notoriety of a feoffment, a fine, or a recovery,[2] and the introduction of conveyances taking effect by virtue of the statute of Uses would have been needless.[3]

From the time of the Conquest, and long before, down to the time of Henry the Eighth and later, it was the policy, or at least

[1] This line of argument was adopted by the defendant's counsel in the case of Rector *v.* Waugh, 17 Mo. 13, as to which the court said, "The strong views presented by the counsel for the defendant are supported by a great weight of authority, but the reasoning on which they are founded has been insensibly undermined, and principles which stood out in bold relief when the feudal policy was the idol of the law have gradually lost their force." The court, however, decided the case against the estoppel on another ground ; see *supra*, p. 381, n. 2.

[2] So, to render effectual a covenant to stand seised to uses, it was necessary that the covenantor should have a vested estate, and therefore a covenant to stand seised of land which the covenantor should afterwards purchase was void. 2 Sanders on Uses, 83 ; Preston's note to the Touchstone, p. 165. "A man cannot by a covenant raise a use out of land which he hath not." Yelverton *v.* Yelverton, Cro. Eliz. 401 ; s. c. Moore, 342. Although at the present day a covenant to charge or dispose of lands hereafter to be acquired will be enforced in equity. Wright *v.* Wright, 1 Ves. 409 ; Metcalfe *v.* Archbishop of York, 1 Myl. & Cr. 547 ; Lyde *v.* Mynn, 1 Myl. & K. 683 ; s. c. 4 Simons, 505 ; Wellesley *v.* Wellesley, 4 Myl. & Cr. 579.

If it be argued in favor of the doctrine of estoppel as held in many parts of this country, that the effect of covenants for title is to raise a use in favor of the purchaser, which the statute would at once execute, the answer is that it was requisite to the execution of a use under the statute that there should be *an estate or seisin out of which the use was to arise*, and therefore contingent uses, during the suspension of the contingency, could not be executed by the statute. 1 Sanders on Uses, 231.

[3] A bargain and sale with warranty by a tenant for life, would, according to this doctrine, have produced a discontinuance ; —a result not properly attributable to such a mode of conveyance as a general rule. Gilbert's Tenures, 119 ; Seymor's case, 10 Rep. 96 ; McKee *v.* Pfout, 3 Dall. (Pa.) 486 ; Prest. Law Tracts, Tract 2. In Jacocks *v.* Gilliam, 3 Murph. (N. C.) 47, s. c. 4 Hawks, (N. C.) 311, it was held that a bargain and sale with warranty by a tenant in tail did not operate as a discontinuance, and in Pollock *v.* Speidel, 17 Ohio St. 439, it was decided that such conveyance would not estop the subsequent donees in tail. *Supra*, p. 146, n. 1.

the theory, of the law that notoriety should attend the transfer of land, and all the legal ingenuity and machinery which, during those centuries, were called into being to contravene and thwart this policy or theory were largely useless if the view taken by some of the American authorities be the correct one, for in many instances warranty would have done the work more simply. It is as fair to reason from what legislatures did not do, as from what they did, and when we find a series of statutes during several centuries limiting the effect of warranty in other connections, and not touching this connection at all, though vital to the law of transfer of real estate, it is not unreasonable to infer that no one ever thought that the connection existed. Certain it is that from the earliest to the latest times no one in England ever put such a construction upon the language of Littleton and Coke.[1]

§ 255. Of course it is not meant to deny that the presence of a covenant for title may not operate as a personal rebutter, which, as against the grantor and his privies, will prevent him or them from claiming the land if and when he or they should subsequently acquire title to it. But this is only by reason of the covenant being considered evidence of what was the contract between the parties; in other words, what was the intention as appearing on the face of the deed; and as to this, it is, or should be, immaterial whether the intention is evidenced by the covenants for title, or by recital, averment, or the like. This was so clearly stated by the Supreme Court of the United States in the year 1850, in Van Rensselaer *v.* Kearney,[2] as to preclude argument,

[1] "The magnitude of the innovation which this would have occasioned may be estimated by reflecting that during the period when warranties were most employed the law did not permit estates of freehold to be conveyed by deed [by which the learned commentator must be understood to mean by deed *alone*, without actual livery of seisin], and that when deeds of bargain and sale were subsequently introduced by the statute of Uses, it was thought necessary to provide for their publicity by the statute of enrolments. It is evident, therefore, that no one had then conceived that a warranty in a deed could have the effect of transferring an estate which did not pass by the operation of the deed, apart from the warranty." Note to Duchess of Kingston's case, 2 Smith's Leading Cases.

[2] 11 How. (S. C. U. S.) 297. In 1795, Van Rensselaer having but a life estate in certain lands, conveyed them in fee to Penfield by deed of bargain and sale with a covenant against incumbrances. In 1813, Van Rensselaer acquired the fee in these lands, and on his death in 1828 it descended to the complainants as his heirs at law, who brought this suit in equity against the parties holding under Penfield's title, for an account of the rents and profits and a surrender of the title

and to the view there expressed consistent assent has been and

papers. The complainants insisted that the conveyance was by a quitclaim deed, with no covenant but that against incumbrances, and that this not only could not be regarded as warranting the title, but also, being an express covenant, took away all implied ones. The appellant contended on the other hand that this covenant, from its peculiar phraseology and structure, was intended as something more than a mere covenant against incumbrances — as, in fact, a covenant for the goodness of the title which the deed purported to convey. But the court held — and that "independently of any covenants of title, in the technical sense of the term, in the deed" — that the latter contained such proof of the intention to convey a fee as to estop the complainants from asserting their title. "The general principle is admitted," said Mr. Justice Nelson, who delivered the opinion, "that a grantor conveying by deed of bargain and sale, by way of release or quitclaim of all his right and title to a tract of land, if made in good faith and without any fraudulent representations, is not responsible for the goodness of the title beyond the covenants in his deed. A deed of this character purports to convey, and is understood to convey, nothing more than the interest or estate of which the grantor is seised or possessed at the time; and does not operate to pass or bind an interest not then in existence. The bargain between the parties proceeds upon this view; and the consideration is regulated in conformity with it. If otherwise, and the vendee has contracted for a particular estate, or for an estate in fee, he must take the precaution to secure himself by the proper covenants of title. But this principle is applicable to a deed of bargain and sale by release or quitclaim, in the strict and proper sense of that species of conveyance. And therefore, if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain had proceeded upon that footing between the parties, then, *although it may not contain any covenants of title in the technical sense of the term*, still the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted; at least so far as to estop them from ever afterwards denying that he was seised of the particular estate at the time of the conveyance." And after referring to the authorities of Doe d. Marchant *v.* Errington, 8 Scott, 210; Bowman *v.* Taylor, 2 Ad. & Ellis, 278; Fairbanks *v.* Williamson, 7 Greenl. (Me.) 96; and Right *v.* Bucknell, 2 Barn. & Ad. 281 (*supra*, p. 362, n. 2), the opinion thus continues: "The principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between parties and privies. The reason is that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gainsaying it. The doctrine is founded, when properly applied, upon the highest principles of morality, and recommends itself to the common sense and justice of every one. And although it debars the truth in the particular case, and therefore is not unfrequently characterized as odious and not to be favored, still it should be remembered that it debars only in the case where its utterance would convict the party of a

must be given.[1] This doctrine is, however, very different from that which, likening the modern covenants for title to the ancient warranty, and giving to the latter a supposed effect which it never had, holds that the after-acquired estate passes directly by mere operation of law, overriding, as it were, all subsequent estates or interests, no matter how acquired.

previous falsehood, would be the denial of a previous affirmation upon the faith of which persons had dealt, and pledged their credit or expended their money. It is a doctrine, therefore, when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party only when in conscience and honesty he should not be allowed to speak."

[1] This decision was approved by the same court in French *v.* Spencer, 21 How. (S. C. U. S.) 240; by the U. S. Circuit Court in McGill *v.* Jordan, 41 Leg. Intell. (Pa.) 420; as also in Gibson *v.* Chouteau, 39 Mo. 536, 567; Clark *v.* Baker, 14 Cal. 629; and Calder *v.* Chapman, 52 Pa. 359, *infra*, p. 409. And in other cases the same view of the law has been practically applied. Thus in Nixon *v.* Carco, 28 Miss. 426, Carco, being in possession of lots to which he had no title, conveyed them to the grantors of the complainants by an instrument not under seal and containing no covenants whatever. Subsequently a patent was granted to him for these lands, and the complainants filed a bill against his heirs to enjoin the latter from setting up the title which accrued by the patent, and it was held that the complainants were entitled to the relief prayed for. "It is said that the instrument of sale executed by Carco," said the court, "is not binding on his heirs, because it is not executory and contains no covenant of warranty. If the instrument purported to be, or was in fact, a mere quitclaim of an interest in the land not then *in esse*, the authorities cited would be pertinent to show that the heirs were not estopped by the act. But it is admitted to have been intended as a valid and sufficient sale, that the right intended to be sold was a subsisting equitable one, and that the sale was not void for illegality. It purports to have been made for a valuable consideration, and to be a conveyance of his right; and it is manifest that the present claim of his heirs is utterly inconsistent with the right intended to be conveyed by him. If it were a formal bargain and sale, there can be no pretence but that it would estop the heirs; and it is conceded that it was intended as such. It must therefore be considered as having that effect in equity, and fall within the general rule that the heir cannot set up a subsequently acquired title against the deed of bargain and sale of his ancestor."

So in Potter *v.* Potter, 1 R. I. 43, a widow entitled to dower in the estate of her deceased husband married a second time. The real estate of the first husband was sold by his administrator for the payment of his debts, she not joining in the deed. The title afterwards came to the second husband, who afterwards conveyed the same with a covenant of warranty. In an action of dower brought by the husband and wife against the purchaser from the former, it was held that they were estopped by his covenants from claiming dower during the continuance of their marriage. It was urged that this was not a covenant between the same parties — that the wife had made no covenants with her husband which estopped her. "That is true," said the court, "but the husband by the marriage gains a right to the possession and use of the estate; such an interest and title during the marriage as enables him to control it. He has a freehold interest in her dower, determinable upon the dissolution of the marriage. There is no equity in the claim of the wife, for she has participated in the consideration received by her husband for the estate." See also Long Island R. R. *v.* Conklin, 32 Barb. S. C. (N. Y.) 381, 388; Kilmer *v.* Wilson, 49 id. 86.

§ 256. Now there are thus two grounds upon which most if not all of the cases referred to can rest with entire accuracy.

One is that the covenants operate as a personal rebutter merely, and for the purpose of avoiding circuity of action, prevent the grantor or his heirs from setting up the after-acquired estate, which equity would of course compel him or them to convey to the prior grantee.[1]

The other is that the effect of the covenants is as if a particular recital or averment had been introduced, and that the grantor was therefore estopped by his deed from denying its efficacy.[2]

But neither of these grounds would produce the effect of *actually transferring* the after-acquired estate.

§ 257. The practical difference between these two results — viz. between the covenants for title operating as a rebutter by placing the grantor and his heirs under a disability to claim the after-acquired estate, and their operating as an actual transfer of that estate itself — is felt in two important connections: first, as between the purchaser and his heirs and assignees on the one side, and the grantor and his heirs on the other; and secondly, and with graver importance, as between the purchaser and a subsequent purchaser from the same grantor.

§ 258. First, then, as between the purchaser and the grantor and his heirs.

It might at first sight appear to make little difference whether, as between these parties, the after-acquired estate actually passes to the purchaser by direct operation of law, or whether the latter is secured in his possession from the fact that the grantor and

[1] Lewis *v.* Baird, 3 McLean, (C. C. U. S.) 80; Henderson *v.* Overton, 2 Yerg. (Tenn.) 397; Chew *v.* Barnet, 11 Serg. & Rawle, (Pa.) 389; Reese *v.* Smith, 12 Mo. 351; Steiner *v.* Baughman, 12 Pa. 108; Brown *v.* Manter, 1 Foster, (N. H.) 528; Pierce *v.* Milwaukee R. R., 24 Wis. 554; see Butler *v.* Seward, 10 Allen, (Mass.) 467; see also *infra*, §§ 262, 265.

[2] Thus in Goodson *v.* Beacham, 24 Ga. 150, it was said: "Nims, when he made the deed to Beacham had no title, but his deed was an attempt to convey the fee, and it was a deed with a warranty. This shows first, that it was the *intention* that the *land*, the *whole* interest in the land, should be conveyed to Beacham; secondly, that Beacham had paid the purchase money. Such being the intention, the consequence would be that if Nims should afterwards acquire the title he would be bound to convey it to Beacham, as much so as if the contract were one standing in the form of a bond for title. Perhaps this would be the consequence even without the warranty; Taylor *v.* Debar, 2 Ch. Cas. 212; Wright *v.* Wright, 1 Ves. 409; Noel *v.* Bewley, 3 Sim. 403; Smith *v.* Baker, 1 Younge & Coll. Ch. 223; Jones *v.* Kearney, 1 Dr. & War. 159." And see *infra*, § 262 *et seq.*

his heirs are not allowed to claim it; whether the purchaser has the valid title actually and finally vested in him, or whether the only person who has the better title is under a disability which prevents him from setting it up.[1]

The practical difference is, however, this: where by virtue of the estoppel supposed to be created by the covenants the after-acquired estate actually passes to and vests in the purchaser by mere operation of law, it must necessarily relate back and take effect as if it had originally passed by the conveyance to him; and hence in an action to recover damages for a breach of the covenant of warranty, a verdict must be ordered for the defendant; or if the action were for a breach of the covenant for seisin, though there might be a technical breach, yet the plaintiff would be entitled to nominal damages only;[2] and thus if the land had diminished in price, the purchaser would not have the option either to retain it, or to offer to reconvey it, and recover its consideration. Such a course of decision, as has been

[1] In Buckingham *v.* Hanna, 2 Ohio St. 551, which was decided since these remarks were first written, this distinction was noticed, and the application of the doctrine of estoppel, to the extent claimed by some of the New England cases, would have been unjust in the extreme and was properly limited by the court. The case is noticed at length in the fourth edition of this treatise, p. 419 *et seq.*

[2] Thus in Baxter *v.* Bradbury, 20 Me. 260, where the grantee being in possession brought an action "on the covenant for seisin in a deed of warranty," the court below having rejected evidence offered by the defendant to prove that after his conveyance to the plaintiff the valid title had been conveyed to him, it was argued, in support of the admissibility of the evidence, that the defendant having afterwards acquired a perfect title to the land, it inured to the plaintiff by estoppel, and the Supreme Court sustained this position, and held that the plaintiff, by taking a general covenant of warranty, not only assented to, but secured and made available to himself, all the legal consequences resulting from that covenant, and that having before the commencement of the action acquired the seisin which it was the object of both covenants to secure, he could be entitled only to nominal damages.

So in Reese *v.* Smith, 12 Mo. 344, justly pronounced by Mr. Bigelow (Estoppel, 4th ed., 426, n. 1) to be "a remarkable case," it was said, "Where there is a covenant of seisin which is broken, and subsequently to the breach the covenantor acquires the title, if there be in the deed a covenant of general warranty, by virtue of which the covenantee will, by operation of law, be vested with the subsequently acquired title, the damages can be but nominal;" and the judgment at law upon the covenants was actually enjoined. For the facts and opinion of the court in this case, see *supra*, p. 253, n. 2; McCarty *v.* Leggett, 3 Hill, (N. Y.) 134, cited, *supra*, p. 252, n. 2; Cornell *v.* Jackson, 3 Cush. (Mass.) 506, cited *supra*, p. 335, n. 1; but see the more recent case of Blanchard *v.* Ellis, 1 Gray, (Mass.) 199, *supra*, p. 259, n. 3.

So in King *v.* Gilson, 32 Ill. 348, King conveyed certain lots to which he had no title to Gilson, with covenants for seisin and of good right to convey, and afterwards by several mesne conveyances they became vested in Hillman, who, using Gilson's name, brought covenant against King. After suit brought and before trial,

said in another part of this treatise,[1] obviously fastens upon the purchaser the subsequently acquired title *nolens volens*, depriving him of the option whether to accept it or to fall back upon the covenants; in other words, it has virtually the same effect as an injunction restraining him from proceeding at law upon the covenants.[2]

The injustice of such a result seems, however, sufficiently obvious, and in a case in New York it was held, with much force of argument, that equity would not under such circumstances interfere at the instance of the party bound by the covenant,[3] and

the real owner of the lots conveyed them to King. In the court below, a verdict was rendered in favor of the plaintiff for the amount of the consideration money, but this was reversed on appeal, and it was held that as the title subsequently acquired by King immediately inured to the benefit of the plaintiff, the latter was entitled to nominal damages only.

So in Knowles *v.* Kennedy, 82 Pa. 445, Knowles, having a life estate in land subject to dower, executed a deed, with full covenants except against the dower interest, purporting to convey the land in fee to Kennedy, who took possession. Afterward Knowles acquired the fee, and thereupon Kennedy tendered him a reconveyance, demanding a return of the purchase money, which Knowles refused, and Kennedy brought an action on the covenant. The court below held that he could recover the purchase money with interest from the time he demanded its return. But the Supreme Court, reversing this judgment, adopted the rule in Baxter *v.* Bradbury, and limited the plaintiff's right of recovery to nominal damages and such further damages as the evidence showed him to have sustained.

[1] See *supra*, § 179.

[2] And such was actually the decision in Reese *v.* Smith, 12 Mo. 344, *supra*, p. 253, n. 2.

[3] Tucker *v.* Clarke, 2 Sandf. Ch. (N. Y.) 96. The purchaser having refused to receive a valid title which his vendors tendered to him, together with the costs of an action which he had instituted for a breach of his covenants, the vendors filed a bill to compel him to accept this title, but it was dismissed by Sandford, V. C., who said: "The complainants do not ask the court to compel a specific performance of an open agreement. They seek to compel the defendant to give up his claims under a deed executed seven years before the bill was filed. The executed contract was that the complainants were seised of these lots, and, if they are not, that they should repay the consideration money. This is sought to be reconsidered and turned into a contract, by which, if it should ever turn out that they were not seised, they might either repay the consideration or procure a good title to be conveyed. It would have been a little more plausible if there were a semblance of mutuality about it, so that the defendants might have caused them to procure a good title on discovering the defect. But there is no pretence that the defendant had any such equity. The complainants' ground amounts to this: If the lots had become worth two or three times the price which the defendant paid for them, then they could set up the outstanding title, deprive the defendant of his speculation, and throw him upon the covenants in his deed, which would restore him to the consideration paid. If on the other hand, the lots should depreciate very much, the complainants would procure the outstanding title for him, and retain the price which he paid. There is no equity or fairness in this, and the court cannot grant the relief prayed by the bill without first making such a contract for the parties; a contract which they never did make, and I presume never would have made if any failure of title had been supposed probable

the authority of this decision has been several times recognized and followed.

For if the acquisition of the after-acquired estate operates merely as a personal rebutter, giving to the covenantee a right to come into equity for its conveyance to him,[1] he would have the option of either doing this or of recovering damages on his covenant, and the covenantor could not compel him to do the one in preference to the other. This point has been directly presented in several cases in New York, Massachusetts, Indiana, and Wisconsin, and it has been decided, upon great soundness of principle, that when the grantee has been actually evicted, the after-acquired title cannot, without the consent of the latter, be made to inure to him by way of estoppel, either to defeat his right to a recovery in an action on the covenants for title,[2] or to reduce the measure

when the conveyance was executed." To the same effect was the decision in Bingham *v.* Weiderwax, 1 Comst. (N. Y.) 513; see *supra*, p. 259, n. 1.

In Woods *v.* North, 6 Humph. (Tenn.) 310, an executor sold with a covenant that as executor he was seised of, and had good right to convey, property which in fact belonged to himself in common with other devisees of the testator, and which the will gave him no authority to sell. The purchaser filed a bill to rescind the contract on the ground of imposition, and pending this, the premises were sold by the devisees and purchased by the defendant, who then tendered a deed in his individual capacity. But the court held that this offer presented no good reason for denying the relief prayed by the bill. "If the complainant were compelled to take this title, the price he agreed to give for the land would inure to the individual benefit of the defendant. He has purchased the land, and is bound to his co-heirs only for the price he bid at the sale, under the decree before mentioned, while he would get all the benefit of the exorbitant price, it may be, which the complainant was to give. But if a party fraudulently sell and convey an estate to which there was no title, the vendee who comes into equity to rescind the contract will not be compelled to take an after-acquired title from the vendor." This case is not affected by Blackmore *v.* Shelby, 8 Humph. (Tenn.) 439, for there the contract had not been consummated by execution of the deed; and it is familiar that the vendee will, in general, be compelled to take the title, if acquired by his vendor at any time before final decree. It may be remarked of Woods *v.* North that the presence of fraud in the case was only material in giving the plaintiff a standing in equity to rescind the contract, and the principle of the case applies equally in any case where from other circumstances the plaintiff would be entitled to relief in equity, or to damages on his covenants in a court of law.

[1] *Infra*, Ch. XV.

[2] Blanchard *v.* Ellis, 1 Gray, (Mass.) 193; see the opinion of the court, *supra*, p. 259, n. 3. Of this case Mr. Bigelow says (Estoppel, 4th ed., 425, n.): "The writer personally knows that the opinion of the able judge [Thomas, J.] was to the last very strongly against the notion that the covenant of warranty, however broad, could have the effect of actually transmitting an estate." Bingham *v.* Weiderwax, 1 Comst. (N. Y.) 509; for the facts and opinion of the court, see *supra*, p. 259, n. 1.

In Burton *v.* Reeds, 20 Ind. 87, Burton conveyed certain lands to Reeds, with covenants for title, on which the latter, being evicted by paramount title, brought suit. After action brought, the paramount title was conveyed to Burton who pleaded this in bar. But the court said: "The appellant says that having bought in and in-

of his damages. In other words, the option, when there is one, should be the option of the party entitled to the benefit of the covenants rather than the option of the party bound by them.

vested himself with the paramount title, the plaintiff is not entitled to more than nominal damages. The general doctrine is, 'that A., having no title, makes a deed to B. with full covenants of warranty, and A. subsequently acquires title by descent or purchase, he is estopped by his covenant, as against his grantee, to deny that he had a good title at the time of the grant, and such new title is said to inure to the grantee.' It is conceded that this rule applies where the action is upon the covenant for seisin and where the covenantee is in possession, but it is contended, that where the grantor purchases the paramount title after the eviction of his grantee, such title does not inure to his grantee by way of estoppel, without his consent, so as to defeat his right to maintain an action upon the covenants of warranty and the quiet enjoyment, and to recover the consideration paid by him and interest. This view of the rule, and the exception to it, seems to accord with the weight of authority." And the court, citing Blanchard *v.* Ellis, *supra*, continued, "This decision is sustained by various adjudicated cases, and enunciates a principle which seems to be clearly right. Tucker *v.* Clarke, 2 Sandf. Ch. (N. Y.) 96; Bingham *v.* Weiderwax, 1 Comst. 513. If then we are correct in our conclusion that the plaintiff in this case was evicted from the premises, such eviction evidently occurred prior to the institution of this suit, and, in sequence, the title acquired by the defendant after its commencement cannot, in the absence of the plaintiff's assent, be allowed to inure to him either in bar of the action or in mitigation of damages."

In Noonan *v.* Ilsley, 21 Wis. 139, the plaintiff, having no title to certain lots, conveyed them, in 1856, to the defendant, who gave his due-bill for a portion of the purchase money. In April, 1862, the plaintiff sued on the due-bill, and the defendant, by way of defence and counter claim, alleged a breach of the plaintiff's covenant for seisin. In November, 1862, after the action had been commenced, the plaintiff acquired the good title to the lot, which he claimed at once inured to the defendant and deprived him of this defence, and so the court below charged, but this was reversed in the Supreme Court. "The defendant," said Downer, J., who delivered the opinion, "was entitled to a fair indemnity for all the damages he had sustained. All the rules on this subject have been framed with a view to give him such damages as will indemnify him. These rules are in substance as follows: If there is an entire failure of title, and the vendee has had no actual possession, he is entitled to recover the purchase money and interest from the date of the deed. If the title to a part of the lands only fails, he is entitled to recover the purchase money and interest of that part. If the title fails, and he has had actual possession of the land, he is entitled to recover the purchase money and interest thereon for such length of time as he himself may be liable for the use and occupation of the premises to the rightful owner, which is in most of the States not exceeding six years preceding the rendition of the judgment. If he has had possession until the statute of limitations has closed upon all adverse claims, and the title is thus perfected in him, he can recover only nominal damages; and if there is a covenant of warranty in the deed to him, and his grantor, before suit brought and probably before judgment in the action for breach of the covenant of seisin, acquires the title, it inures to his benefit; and if he has had possession and is not liable to any one for the use of the premises, the damages are nominal. Therefore if the defendant or his vendee had had actual possession of the premises from the date of the deed of the plaintiff to him, he would still have the right to recover damages equal to interest on the consideration money of the two lots for six years preceding the delivery of the deed to the plaintiff, if the trial had taken place at or about the date of the deed, for the reason that the occupant would be lia-

It will hereafter be attempted to show that the doctrine by which the after-acquired estate inures to a prior grantee is purely equitable, and when enforced by courts of law is done so by their administering equity through the medium of common law forms; namely, by treating as having been conveyed that which equity would decree to be conveyed, but that, apart from this, the prior grantee has no right which can be enforced at law except by a recovery in damages for a breach of the covenants he has received. In equity, however, he has a right to claim that the after-acquired title should be conveyed to him, and these are distinct and different remedies, cognizable in different tribunals, and enforced by different machinery. If, then, by reason of a broken covenant, the prior grantee has the right to damages in a court of law, and, in the alternative, has also, if he choose to take advantage of it, the right to demand in equity that the after-acquired title be conveyed to him, it is difficult to see how the alternative and optional right to relief in equity should utterly and *ipso facto* destroy his right to damages at law.

§ 259. Secondly, as between the purchaser and a subsequent purchaser from the grantor. The practical results of this doctrine of estoppel, when applied as between the purchaser and the grantor, yield in importance to those which arise in the connection we are now to consider. It has been already said that the class of cases which has been cited hold that the estoppel created by the covenants operates actually to transfer the after-acquired title, by mere operation of law, and even against the consent of the party entitled to the benefit of the covenants. "The obligation created by estoppel," it has been said in an often quoted opinion, "not only binds the party making it, but all persons privy to him; the legal representatives of the party, those who stand in his situation by act of law, and all who take his estate

ble to the plaintiff's vendor. It can hardly be contended that the damages should be less when the deed of the plaintiff gave the defendant no right of possession and was followed by no actual possession. The true rule of damages in such case must be either the value of the use of the premises for the time the grantee had neither possession nor the right of possession, or interest on the consideration money for that time, and we think the latter. Such damages the instruction precluded the defendant from recovering, and for that reason the judgment must be reversed." And the court cited Tucker *v.* Clarke with approbation, distinguished Baxter *v.* Bradbury, and disapproved of Reese *v.* Smith, *supra*, p. 253, n. 2.

by contract, stand in his stead and are subjected to all the consequences which accrue to him. It adheres to the land, is transmitted with the estate, it becomes a muniment of title, and all who afterwards acquire the title take it subject to the burden which the existence of the fact imposes on it. These principles had their origin at a very early period in the common law." [1] Such a course of decision, if logically followed, leads to the result that the after-acquired title vests in the grantee, not only as against the grantor and his heirs, but as against a subsequent purchaser from the latter of the after-acquired title.[2]

And the result itself, when applied to the case of a *bona fide*

[1] Douglass *v.* Scott, 5 Ohio, 198. (This case was, however, rightly decided on the facts. Kerr was grantee, with covenants, of an estate not patented to the original grantor till afterwards. The plaintiff had bought at sheriff's sale under a judgment against Kerr; and the defendant, at a sale under a subsequent mortgage made by him. The Legislature appointed a special trustee of the original covenantor's legal title, with power to convey it by patent to the party who had the right to it. The plaintiff obviously had such right, and of course the defendant could take nothing by having the conveyance made to himself.) Wark *v.* Willard, 13 N. H. 389; White *v.* Patten, 24 Pick. (Mass.) 324; Dudley *v.* Cadwell, 19 Conn. 226; Pike *v.* Galvin, 29 Me. 185; Bank of Utica *v.* Mersereau, 3 Barb. Ch. (N. Y.) 567; Tefft *v.* Munson, 57 N. Y. App. 97; Massie *v.* Sebastian, 4 Bibb, (Ky.) 436; Jarvis *v.* Aikens, 25 Verm. 635. In Dickerson *v* Talbot, 14 B. Mon. (Ky.) 64, it was said that the estoppel passed not the equitable but the legal title to the prior grantee.

This doctrine has lately been thus unmistakably reiterated by the Supreme Court of Massachusetts in Knight *v.* Thayer, 125 Mass. 25. "It has been the settled law of this Commonwealth for nearly forty years," said Gray, C. J., "that under a deed with covenants of warranty from one capable of executing it, a title afterward acquired by the grantor inures by way of estoppel to the grantee, not only as against the grantor, but also as against one holding by descent or grant from him after acquiring the new title. Somes *v.* Skinner, 3 Pick. 52; White *v.* Patten, 24 Pick. 324; Russ *v.* Alpaugh, 118 Mass. 369, 376. We are aware that this rule, especially as applied to subsequent grantees, while followed in some States, has been criticised in others. See Rawle on Covenants (4th ed.), 427 *et seq.* But it has been too long established and acted on in Massachusetts to be changed, except by legislation." Certain it is, however, that the learned judge who delivered the opinion in the well-considered case of Blanchard *v.* Ellis, did not consider that the doctrine had been carried quite so far. See *supra*, p. 400, n. 2.

In Powers *v.* Patten, 71 Me. 583, the doctrine of Knight *v.* Thayer, *supra*, was approved, and declared, in spite of the hardship it involved, to be "the settled law of this State, and many titles have been bought and sold upon the strength of it."

[2] In the case of the Great Falls Co. *v.* Worster, 15 N. H. 452, it seems to have been taken for granted that this doctrine would apply only to the case of a purchaser with notice. In other cases, however, the rule has been enforced even against purchasers without notice of the prior conveyance; see the ensuing note. It need hardly be repeated that in this application of the doctrine of estoppel it cannot be held to rest on the preventing circuity of action, as the *assignee* of the covenantor could never be liable to the prior covenantee, or to any one claiming under him.

purchaser without notice, cannot harmonize with the spirit of the registry acts in force in this country, and leads to the position, which certainly cannot be considered as tenable, that a purchaser must search the registry of deeds, not only from the time when his grantor acquired title, but also for a series of years before that time, in order to discover whether he had previously made any conveyance (though without title) to any other person; for if he have, that person will, according to this doctrine, hold the estate as against this purchaser; and if the property has passed through several hands, a similar search must be made with respect to every one through whose hands the title has thus passed.[1]

[1] This argument was pressed upon the Supreme Court of Massachusetts in White *v.* Patten, 24 Pick. 324, and disregarded. The facts of that case afford a striking illustration of the result referred to in the text. In 1833, Thayer, who had no title whatever to certain land, but who was in possession, mortgaged it with a covenant of warranty to White, who put his mortgage on record in February, 1834. In July of that year, Perry, the father-in-law of Thayer, and the real owner of the land, conveyed it to the latter, who the next day mortgaged it to Patten. This mortgage, and the deed from Perry to Thayer, were recorded on the 2d of August following. Thayer continued in possession until 1835, when he was dispossessed by Patten, under an execution upon a judgment obtained against him. A writ of entry was then brought by White against Patten. Under these circumstances, Patten's counsel urged, with great force, that under the registry acts Patten had done enough to search the record back to the time when Thayer acquired title, that is, from July, 1834; and that any search before that time should properly be directed to conveyances or mortgages given by Perry, the real owner, and not by Thayer, who had then no shadow of title. Nevertheless, the court held, upon the authority of cases arising under *leases* (see them cited and explained, *supra*, § 243), that the estoppel created by the mortgage in 1833 bound the subsequent mortgagee of the after-acquired title, and the case was decided in favor of the demandant. Such an application of the doctrine of estoppel obviously strikes a decisive blow at the protection intended to be afforded by our registry acts.

The argument derived from the registry acts was also urged in Jarvis *v.* Aikens, 25 Verm. 635, but the court said: "It is not seriously claimed by [counsel] but that the subsequent title acquired by Aikens would inure to the benefit of Jarvis, so as to estop Aikens and his heirs from claiming title against him and his assignees; but it is said that the principle should not be applied as between the purchaser and a subsequent purchaser from the grantor, and that to so apply it would be at war with our registry system. This is a point of some importance, and well deserves consideration." After then quoting the language used in Douglass *v.* Scott, 5 Ohio, 198, *supra*, p. 403, n. 1, the opinion continued: "In this view of the case, our registry system can have no control of the question. There was no title in Aikens when he deeded to Murphy; it had before passed to Jarvis, and was vested in him. In the case from 24 Pick. 324 (White *v.* Patten, *supra*), the point was specially made by counsel that this doctrine was in conflict with their registry system, but the court did not regard the objection. The same objection has been made in other cases, but without effect."

But it may be suggested, with great deference, that this practical repeal of the registry acts would seem to be judicial legislation. See *infra*, § 261. In McCusker *v.* McEvey, 9 R. I. 528, the court,

Such a thing as absolute security in the purchase of real estate is of course unknown. Two systems exist, each widely different, on the opposite sides of the Atlantic; one in England, depending on the security afforded by the possession of title papers, and the

per Durfee, J., in speaking of the cases now under consideration, said: "The doctrine of these cases, or of the major part of them, however, has been impugned by the American annotator of Smith's Leading Cases, and by Mr. Rawle, as based on a misconception of the English authorities and as erroneous in principle — the warranty being, in their view, effectual only by way of estoppel or rebutter against the warrantor and his heirs, but inoperative on the after-acquired estate — and also as inconsistent, where applied to the prejudice of a *bona fide* purchaser for value without notice, with the spirit and purpose of the recording acts of the several States. The argument in support of these views is certainly very strong, if not theoretically unanswerable; but the doctrine impugned has been so often and so fully recognized in the courts and repeated in the text-books, that we feel bound, out of regard for the security of titles, to follow the precedents. The argument derived from the recording acts was particularly urged in White *v.* Patten, 24 Pick. 324, and in Jarvis *v.* Aikens, 25 Vern. 635, and in both cases disregarded; and it may be remarked that the doctrine, however much it may be at variance with the spirit, does not violate the letter of the recording acts. . . . We think the rule, notwithstanding some adverse and some doubting decisions, has been too uniformly recognized by the American courts to be now repudiated or modified without the authority of a statute, and we are free to say, we think a statute is called for in view of this state of the law, in order to carry into full effect the policy of our recording act, and to prevent its operating, in cases of this kind, as a snare rather than as a protection to purchasers." But from the actual decision in this case, Potter, J., dissented in a learned opinion, (to be found in Appendix to 10 R. I. 606,) wherein, suggesting that if the controversy were between the grantor and his grantee the case would be different, he proceeds: "If it is alleged that the first grantee has relied on the declaration in his deed and paid for the land, so equally has the second grantee. If it is alleged that by holding that the grantor and his assigns under the second deed are estopped from setting up any title against the first deed, a suit on the warranty is prevented, and so circuity of action avoided — it is plain that this ground cannot be maintained, because another lawsuit is not prevented; it is merely left to the second grantee. The spirit of the rules does not seem to apply to such a case. Both of these parties have equally relied on the grantor's declaration: one of the two is to be left to the luxury of a lawsuit; now where is the equity of the case? Under our system of registry, which to some extent takes the place of the ancient ceremonies of delivery of seisin and open possession, the first grantee in this case could have ascertained by examination of the records whether Weeden or any of the mesne conveyancers had a good title to the land; and if he found no title there, or anything to put him on his guard, could have required Weeden, or the person of whom he was immediately purchasing, to satisfy or secure him. The second grantee, going to the records, would find that Weeden at a certain date had acquired the title and had not conveyed it away since that date. Is it reasonable to require him to examine further, so far as relates to his acquiring whatever title Weeden had at that date? On the other ground he would be required to examine whether his grantor had not conveyed away the land before he bought it; and so on as to every preceding grantor indefinitely. And in case of a strip of land on the border of a lot (which is the present case) it might involve an examination of the title to all the surrounding land, and no one would be safe without it."

other in the United States, far more efficient, depending on the security afforded by the registry (or as they are often called the recording) acts. As to the former in connection with this subject, a word will be presently said. As to the latter, no one will deny that both the letter and the spirit of these acts are to the effect that an unregistered deed is (with certain limitations as to time, etc.) void as against a subsequent purchaser without notice; that a deed which, by reason of defective execution or the like, is not entitled to go upon the registry, is deemed unregistered; and that a purchaser who searches the registry for previous deeds made by his grantor is not obliged to go beyond what is called "the line of title." It were affectation to cite authority for such familiar knowledge.

Nothing is more simple than what is "the line of title" as to the question now being considered, viz. that of a conveyance by a vendor without title, and a subsequent conveyance, after title has been acquired, to another. The first purchaser should search the registry for the deed to his vendor, and trace the title back to its source. If, as will of course be the case, he finds no title in his vendor, the fault is his own if he complete the sale. It is, of course, equally his fault if he take his deed without examination of the title at all. Now for the second purchaser, the rule is equally simple. He, too, searches the registry for the deed to his vendor, and traces the title back to its source. He finds it regularly deduced, and that his vendor has, *since he acquired title*, made no conveyances thereof, and he is protected in taking his deed. And no one would pretend that the search for conveyances by his vendor should be made not only *since* he acquired the title, but also extend to all time *before* he had any title at all, and that the same search should be made against every one in the line of title. Yet according to the practical effect of the doctrine now being considered, and apart from counter equities, the purchaser, having thus brought himself within all the provisions of the registry laws, is not protected at all if his vendor had, before he acquired title, conveyed to another, with covenants, a title which was without existence or value.

Such a doctrine, thus carried to its logical results, cannot and ought not to stand the test of experience,[1] and in recent cases

[1] For as Judge Hare has well said, "It necessarily tends to give to a vendee who has been careless enough to buy what the vendor has not got to sell, a preference over

decided since these suggestions were first made, courts have distinctly held that as against a subsequent purchaser without notice the after-acquired title does not inure to a prior grantee.

Thus in a Georgia case decided in 1855,[1] one Pyncheon having conveyed to the plaintiff, with warranty, a tract of land, described by reference to a certain plan, and having subsequently acquired an adjoining tract and conveyed this to the defendant, the plaintiff claimed that part of the latter tract was included in the boundaries called for by the first conveyance, and had therefore passed to him as soon as Pyncheon acquired it. But the court said, "We are strongly inclined to the opinion that our registry acts, under the modern form of conveyancing, are a virtual repeal of the doctrine of estoppel. At any rate, it is quite clear that notwithstanding Pyncheon sold to the plaintiff with war-

subsequent purchasers who have expended their money in good faith and without being guilty of negligence." Note to Duchess of Kingston's case, 2 Smith's Lead. Cas. (8th ed.).

A similar suggestion was lately made in the reporter's note to the very recent case of Salisbury Savings Society *v.* Cutting, 50 Conn. 113. The case was argued as if it necessarily involved the question whether a deed given with covenants of warranty before the grantor acquires title is to prevail over a deed given, after he acquires title, to a purchaser in good faith, without notice of the former deed and for valuable consideration. And Park, C. J., who delivered the opinion, said, "If we were called upon to decide this question, we should regard it as one of very serious difficulty, inasmuch as in sustaining the later deed we should have to deny the controlling application to the case of the well-settled principles of estoppel; while in sustaining the prior deed we should have to violate the entire spirit of our registry system, which it is the policy, and we may say in every other case the unyielding policy, of the law to sustain." Accordingly, the court finding, in the record, proof that the grantee in the later deed was not a purchaser for value or without notice of the prior deed, rested its decision on that ground, and refused to consider the question whether, in the case supposed, the principle of estoppel or the registry acts should prevail. In a well-considered note, the reporter reviews the authorities on this question and says: "It is a well-settled rule that where a loss must fall upon one of two equally innocent parties, it shall be borne by him whose act, however innocent, caused it. Now supposing the prior grantee, in taking a deed from a party who had no title, is to be regarded as equally free from negligence with the later grantee, who did his full share in searching the records, yet it was the act of the former in taking a conveyance in such an unusual manner that caused the whole difficulty. But this is upon the supposition that the prior grantee is not in fault. Much more should he bear the loss where he has been clearly guilty of negligence. If he took his deed without knowledge of the want of title in his grantor, he would seem to have been guilty of gross carelessness in not examining the public records. If he knew he had no title, and was willing to take his chance for his acquiring one, the case becomes almost one of fraud upon a person who purchases in good faith and for value after a title has been acquired. It would seem to violate every principle of equity to allow a party guilty of either, to prevail over the innocent and diligent later purchaser."

[1] Way *v.* Arnold, 18 Ga. 181.

ranty, and afterwards bought [the second tract], this after-acquired interest did not feed the estoppel and pass the property in controversy immediately to the plaintiff." [1]

[1] In Linsey *v.* Ramsey, 22 Ga. 627, the warranty was held to *rebut* (not to *estop*) the grantor who had made the deed before he acquired title; "and after he had acquired title, he himself, in the face of his warranty, sued his warrantee for the land," and was, of course, held not to be entitled to recover.

The Georgia cases growing out of the State land lottery were put on a wholly different ground, and therefore are not at variance with Way *v.* Arnold. In them, it was merely held that the payment of the grant fee gave the allottee an equitable title which passed by a deed with warranty, so that when the subsequent grant from the State cast the legal title upon him, the statute of uses immediately vested it in the warrantee, and the warrantor had nothing left to convey to a third party. Henderson *v.* Hackney, 23 Ga. 383; Bivins *v.* Vinzant, 15 id. 521; and see *supra*, p. 367, n. But even in such cases, the registry acts are not without effect. Hence in Faircloth *v.* Jordan, 18 id. 350, where, in 1834, Baugh before the land was actually granted conveyed to Carmichael, who recorded his deed in December, 1836, and whose title afterwards became vested in the plaintiffs, and in March, 1836, Baugh acquired the title to the lot in question and conveyed it to Arnold, who recorded his deed at once, and through whom the defendants claimed, a verdict for the defendants was sustained simply because they claimed under the deed which was first recorded. "The doctrine of estoppel by deed," said the court, "the doctrine that the donee in the younger of two deeds for the same land, made by the same donor, is estopped from insisting that the land was not, by the older deed, conveyed to the donee in that deed, is in direct conflict with much of the law contained in our registry acts. In those acts is to be found this rule — that a younger deed, if duly recorded, is to take precedence of an older deed if not duly recorded. This rule, as to the cases that fall within it, is in direct conflict with the aforesaid doctrine of estoppel. And what cases fall within it? Cases in which the donor of the land owned it at the time when he made the first of the two deeds; how much more, then, in cases in which the donor did not at that time own the land, but had come to own it at the time when he made the second deed. We think it clear, therefore, under these statutes, that an older deed not duly recorded cannot operate as an estoppel upon a younger deed duly recorded." Bivins *v.* Vinzant, 15 Ga. 521, was to the same effect on this point. In the subsequent case of Dudley *v.* Bradshaw, 29 Ga. 17, however, it was reluctantly admitted that the views of the court had altered so far as to make actual notice of a prior unrecorded deed take the case out of the registry acts.

In Minnesota, the effect given to the registry acts is the same. In Burke *v.* Beveridge, 15 Minn. 206, one Jackson, having no title to certain lands, conveyed them with covenant of warranty to the defendant, who neglected to record his deed, and the latter conveyed to the plaintiff with covenants for seisin, of good right to convey, for quiet enjoyment, and of warranty. Jackson subsequently acquired the good title, and conveyed it to Hitchcock by a duly recorded deed. The plaintiff sued for breach of the covenants for seisin and of good right to convey; and, on the part of the defendant, it was contended that the after-acquired title of Jackson at once inured to the benefit of the plaintiff, and consequently that Hitchcock took nothing, and that the damages could be but nominal; but the court said, "It is unquestionable that the deed from Jackson to the defendant, not having been recorded till after the making and recording of that from Jackson to Hitchcock, is *prima facie* void as against the latter. Jackson *v.* Given, 8 Johns. (N. Y.) 139; Dunham *v.* Dey, 15 id. 567. But he suggests that the record of the mortgage given by defendant to Jackson ought, with that of the deed to the plaintiff, to operate to rebut the presumption of Hitchcock's good faith. But it is entirely clear that the record of

In a Pennsylvania case in 1866,[1] the question was as directly presented in connection with the registry acts, and the doctrine placed upon its proper basis. One who had bought a tract of land by deed which excepted out of it "the factory lot" mortgaged the whole, without excepting this lot, the mortgage being duly recorded. The next year, he acquired title to the lot, which was afterwards, under a judgment against him, levied upon and sold. Some years after, the mortgagees foreclosed and bought in the

that deed and mortgage was not constructive notice to Hitchcock. 2 Lead. Cas. in Eq. 181. And as there was therefore no presumption of law that he knew of their existence, and as the fact that such record existed would have of itself no tendency to prove that he knew it did, and as defendant introduced no evidence tending to prove any actual notice, not even that Hitchcock examined the records before taking his deed, there was no error in the failure of the court below to submit the question of actual notice to the jury." And it was held that the plaintiff was entitled to recover the amount of the consideration, with interest.

The recent case in Michigan of Smith *v.* Williams, 44 Mich. 240, well illustrates the application of the registry acts. In 1856, B. F. Squires claimed to be the owner of the premises, though it seems he did not receive the patent from the United States until 1859. On December 13, 1856, Squires conveyed to J. Squires, who on the same day conveyed to Williams, the plaintiff in ejectment; none of these deeds were recorded, and this constituted the plaintiff's title. Under, it is presumed, the rule that the plaintiff in ejectment must recover on the strength of his own title and trace it out of the Commonwealth or the United States, as the case may be, these deeds were objected to in evidence, but were, it was held, properly admitted by the court below, the Supreme Court (Cooley, C. J.) saying that where one assumes to convey a title, he will not be suffered afterward to acquire or to attack it and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress was, he said, to deny him the liberty of setting up his after-acquired title as against his prior conveyance. This was merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given. And to this doctrine, thus applied in that case, no exception can be taken. The defendant claimed under proceedings in 1870 against Squires, who was a non-resident, to recover delinquent taxes due by him, in which the decree declared that the defendant's title should be quieted as against any claim of Squires. This evidence the court excluded, and this was affirmed on error, on the ground that "the titles had accrued after he conveyed, and enforcing them neither took from him anything nor made him liable on his covenants. Therefore, if knowledge of the suit had come to him, he would probably have given it no attention, because the result of it could not concern him. The decision as to him might as well have been left unmade." And in answer to the contention that the plaintiff, by not recording her deed until 1877 and by suffering Squires to appear of record as apparent owner, must lose her title by force of the recording acts, it was held "that the defendant was not a [subsequent purchaser] within the provisions of the registry acts, which in Michigan as in most of the United States, provide that an unrecorded conveyance shall be void as against any subsequent purchaser in good faith and for valuable consideration. If in this case the defendant had taken title from B. F. Squires and paid the purchase money, his title as a purchaser would have prevailed over the unrecorded deeds under which the plaintiff claimed, and the after-acquired title from the United States would have inured to his benefit."

[1] Calder *v.* Chapman, 52 Pa. 359.

property, when the sheriff's vendee under the judgment brought ejectment for the lot. It was urged for the defendants that by force of estoppel the after-acquired title of the mortgagor inured to their benefit as mortgagees, but it was held that the registry of the mortgage was no notice to a purchaser of the lot, who was not bound to search for incumbrances or conveyances by his vendor before the time when the latter first acquired title; that the doctrine of estoppel did not apply, and the judgment, which had been entered below for the plaintiff, was affirmed.[1]

[1] After citing the cases which hold that a purchaser is required to take notice of matters of record in his line of title only, Read, J., said, "These decisions rule this case, and there is no hardship on the mortgagees; for an examination of the title when they took the mortgage must have shown them that Calder had no title to the 'factory lot'; an innocent creditor should not suffer for their gross negligence."

The previous course of decision in Pennsylvania has been thus: In the early case of McWilliams *v.* Nisly, 2 Serg. & Rawle, 515, the court said, "J. M. sells and conveys land to which he has no title, but afterwards acquires title. Can his heirs recover against his grantees? It appears to me that in such case they would be estopped by their father's deed from denying his title, and if there were occasion for further assurance, equity would compel them to make it." And it was added, "In equity, a grantor conveying land for which he has no title at the time shall be considered a trustee for the grantee, in case at any time afterwards he should acquire title." Whether the conveyance in this case by J. M. did or did not contain covenants for title is not stated in the report.

In the later case of Chew *v.* Barnet, 11 Serg. & Rawle, 389, it was held in a very able opinion delivered by Gibson, C. J., that the acquisition of the subsequent title enabled the prior purchaser to demand in equity a conveyance from the grantor, but did not vest the title in him of itself by estoppel. "In the case," said the court, "of a conveyance before the grantor has acquired the title, the legal estate is not transferred by the statute of Uses, but the conveyance operates as an agreement which the grantee is entitled to have executed in chancery." In that case Wilson, having an equitable title to certain lands, conveyed them to the plaintiff with covenants of special warranty and for further assurance. The legal title was subsequently conveyed to Wilson, who mortgaged it, and it was held that the plaintiff took subject to the mortgage. "Judge Wilson having nothing but an equitable title," said Gibson, C. J., "could convey nothing more. His deed, therefore, passed to the plaintiff only an equitable title. But it is said the subsequent conveyance to Judge Wilson inured to the benefit of the plaintiff. It did so, but only in equity, and to entitle him to call for a conveyance from Judge Wilson, and not as vesting the title in him of itself, as contended, by estoppel. The facts presented constitute the ordinary case of a conveyance before the grantor has acquired the title, in which the conveyance operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery;" but not of course as to a subsequent purchaser without notice, as was this mortgagee.

Brown *v.* McCormick, 6 Watts, 60, was a strong case, in which the doctrine that the after-acquired estate "by operation of law immediately passes to the grantee" was applied to its full extent, and apparently against a purchaser without notice. (The case is referred to at length in the fourth edition of this treatise, page 432. It was relied on in the argument in Calder *v.* Chapman, 52 Pa. 359, and must

A recent case in Missouri is to the same effect. One Mason, having no record title to a certain lot, conveyed it by deed of

perhaps now be considered as overruled by it.)

In Kennedy *v.* Skeer, 3 Watts, 98, there was a mere assignment of the title acquired under a treasurer's deed, which it was held did not estop the grantor from afterwards claiming the land under a subsequently acquired title.

In McCall *v.* Coover, 4 Watts & Serg. 161, it was held that titles to donation land granted by the Commonwealth to soldiers of the Revolution prior to the acquisition of title by the State were confirmed by the subsequent purchase by the latter. (See *supra*, p. 367, n.

In Tyson *v.* Passmore, 2 Pa. 122, the defendant, by articles of agreement reciting a warrant for seventy-five acres, and a proposed survey, covenanted to convey to the plaintiff all the land "acquired by defendant by the warrant and survey aforesaid." It was proved that the articles intended to convey a tract of two hundred and sixty acres, and that the defendant procured a survey for the seventy-five acres which he transferred to the plaintiff, and afterwards obtained a survey for the residue of the tract. On an ejectment by the plaintiff for this residue (on his equitable title, as was allowable in Pennsylvania), the court held that "the proper relief is not to reform the instrument, but to convert the fraudulent vendor into a trustee *ex maleficio*."

In Shaw *v.* Galbraith, 7 Pa. 111, there had been a conveyance to a grantee without the addition of the word "heirs," but the covenant of warranty was with the grantee and his heirs and assigns, and afterwards a lease by the grantor to the plaintiff for life, who, on the death of the grantee, brought ejectment. A verdict for the defendants was affirmed in error. "Granting that in this deed," said Rogers, J., "a life estate only is granted, and that the subsequent warranty or covenant does not enlarge the estate, yet the question remains whether this covenant may not operate as an equitable rebutter; or, in other words, is Galbraith, and Shaw who claims under him, estopped from asserting a title to the land? . . . By the *habendum*, in consequence of the omission of the word 'heirs,' a life estate only is conveyed to the grantee; but the deed contains a special warranty, whereby the estate is warranted to the grantee, his heirs and assigns. . . . Now although a warranty in favor of the heirs may not enlarge the estate, yet it would be against every principle of construction to reject it as surplusage. In the construction of a deed or will every word must have its own weight, and certainly a distinct covenant, as here, cannot be utterly disregarded. The deed contains a covenant that the grantor will not molest or disturb (that is its effect) either the grantee or his heirs, and if, contrary to his covenant, he recovers the land, and dispossesses the grantee or his heirs, action accrues to recover its value from the grantor. The question then is, whether, to prevent circuity of action, the defendants may not plead an equitable rebuttal, or estoppel, as against the grantor and those claiming under him, . . . and we are of opinion that the grantor and Shaw, the plaintiff, who claims under him, are estopped from denying the title."

In Root *v.* Crock, 7 Pa. 380, where a survey was made for the purpose of a partition, and the heirs conveyed according to the lines of that survey, and a reconveyance was made to one of them of his purpart, it was held that they were estopped from denying the correctness of the boundaries, and the husband of one of the heirs, who had also been a party to the deed, having purchased adjoining land, part of which was included in the survey and deed, it was held that he was estopped from claiming so much as was included. It was argued on his behalf that there could be no estoppel without a warranty, but the court said, "There is no principle in our law better or more plainly settled than that on which the judge instructed the jury — that if a man sells and conveys land to which he has

trust, with covenants for title implied from the words "grant, bargain, and sell." The deed was practically a mortgage, with a clause of defeasance, and was duly recorded. Mason afterwards acquired title to the land and sold it to a purchaser without notice, who sold to the plaintiff. Upon sale being made by the trustee under the first indenture, the plaintiff purchased the premises to secure his own title, and then brought suit for the money thus paid, against the attorneys who had furnished him a clear abstract of title. The question was whether the record of the deed of trust was constructive notice to the purchaser, and it was held that it was not.[1]

no right or title, and afterwards buys or acquires the title to the same land, he cannot claim it as against his grantee."

In Steiner *v.* Baughman, 12 Pa. 108, Gibson, C. J., remarked: "The covenant went directly to the land defined by the courses and distances; and had the vendor subsequently purchased the part of it in question, a chancellor would have compelled him to convey it over again, in order to make good his former deed; and this on an equity from the fact that he had received value for it."

In Skinner *v.* Starner, 24 Pa. 123, it was held that as between the grantor and grantee in a conveyance with general warranty of land which was bound by a prior judgment, the grantor was bound to discharge the judgment, and that the title subsequently acquired by the grantor at a sheriff's sale under such judgment inured to the benefit of the grantee or those claiming under him, but that if the grantee, before the sheriff's sale, conveyed to a third person *expressly subject to all incumbrances*, his vendee was not placed in his position, and had no equitable right to demand a conveyance of the title subsequently acquired by the original vendor at the sheriff's sale.

In Clark *v.* Martin, 49 Pa. 303, the court say, "It is not to be doubted that a vendor who undertakes to sell a full title for a valuable consideration when he has less than a fee simple, but afterwards acquires the fee, holds it in trust for his vendee, and will be decreed to convey it to his use, and equally clear is it that if a vendee mortgage his title, the perfection of the title by the vendor inures to the benefit of the mortgagee." In Turner *v.* Scott, 51 Pa. 133, it was held that a covenant of warranty in an instrument purporting to be a deed, which, however, was construed to be a will, "would protect the consideration therein expressed, which in this case was in the form of services, and if the grantee rendered the services he would be entitled to damages," but that the covenant would not estop subsequent devisees. It is to be observed that in Scott *v.* Scott, 70 Pa. 244, it has since been held that a covenant of warranty could not be created by a will. *Supra*, p. 170, n.

With regard to Shaw *v.* Galbraith, *supra*, it is however to be observed that contrary decisions have been elsewhere made upon similar facts, and it has been considered that the objection that the heirs of the grantor were rebutted from claiming the land by the warranty of their ancestor was met by the decisive answer that the warranty ceased when the estate to which it was annexed determined. Register *v.* Rowell, 3 Jones, (N. C.) 312 (where Seymor's case, 10 Rep. 95 *b*, was relied on to the effect that a warranty cannot enlarge an estate). Rector *v.* Waugh, 17 Mo. 13. In Patterson *v.* Moore, 15 Ark. 222, neither the warranty nor the grant was to the grantee and his *heirs*, and the fact that the warranty was against the grantor and *his* heirs and assigns did not make the rule in Shaw *v.* Galbraith applicable.

[1] Dodd *v.* Williams, 3 Mo. App. 278, decided in 1877. The court, after a review

§ 260. It will have been observed that these cases, thus decided under the registry acts, rested on the ground of the absence of notice — of there being nothing on the registry which was or ought to be notice to an intending purchaser — and in cases where no other notice than the registry is involved, the logic of these authorities would seem to be unanswerable. But constructive notice under the registry acts is only a branch of the general doctrine of notice, it being well settled that whatever is sufficient to put a purchaser upon inquiry is notice, and will deprive him of the defence which otherwise the registry acts would afford.[1] As to what is deemed sufficient thus to put one upon inquiry, possession is prominent, and if, in the facts of any case upon the present subject it be found that the first grantee (that is, the one under a defective or no title) or those claiming under him is in possession, that will be notice to the second purchaser and all claiming under his title. And if it be suggested that if inquiry would lead only to the discovery that the grantee had no title at all, which, under the authorities, would not amount to notice, the answer is that it would disclose that the first grantee was the holder of a legal title, presumably for value, with an equity to compel from his grantor the transfer of the valid title if and when it should

of the authorities, said: "As it is certain that a purchaser of land is affected with constructive notice of anything that lies within the course of his title, it follows that whenever it is held that no examination of title need be made as to conveyances before record title in the grantor, it should logically be held that such deeds cannot affect the rights of innocent purchasers for value, and that the doctrine of inurement and estoppel, which in spite of the registration laws has obtained in many of the States and especially in New England, must be thrown aside. . . . To say that where one who has no title sells with warranty his after-acquired title shall inure to his grantee, so that not only the grantor and his heirs, but all his subsequent grantees are estopped from claiming, irrespective of all questions of registry and notice, seems a most inequitable application of the doctrine of estoppel, and it is no wonder that in recent cases courts have shrunk from carrying the doctrine to such results. . . . We think that Dodd was a purchaser without notice, and was not estopped from setting up his title against the purchaser under the deed of trust, who carelessly took a deed of property to which his grantor had no title and of which he had no possession. . . . Dodd was not bound to examine the records for conveyances of Mason prior to the date of his record title."

[1] Notes to Basset *v.* Norsworthy, and Le Neve *v.* Le Neve, 2 Lead. Cas. in Eq.; Story's Eq. Jur. § 400 *et seq.*; Bispham on Equity, § 268. Thus in Way *v.* Arnold, 18 Ga. 191, *supra*, p. 407, n. 1, the court expressly said that its decision would have been different if the after-acquired interest had been intended to be conveyed to the first grantee, and the second grantee had purchased with notice of this fact, for then he "could not conscientiously hold the land in dispute." To the same effect is Doyle *v.* Petroleum Co., 44 Barb. S. C. (N. Y.) 240.

devolve upon him. This of course would amount to notice to the intending purchaser that the otherwise valid title he was about to purchase was bound by an equity in favor of a previous purchaser. If, therefore, by reason of possession or any other sufficient circumstance, the second purchaser has notice of the prior title, he must be deprived of the protection of the registry acts, which would not be considered to apply to the case. Thus in a recent case in Delaware, the facts were such that unless the element of possession had entered into the case, judgment would necessarily have been, under the operation of the registry laws, given for the plaintiff; but it appeared in the case that the grantee of the defective title immediately went into possession and had continuously received the rents and profits, and after elaborate consideration of the general doctrine now under consideration, the court, in giving judgment for the defendant, concluded the opinion by saying, "As the defendant has been in possession from the date of his deed, it is not material in this case to consider the effect of recording the several deeds referred to in the case stated." [1]

[1] Doe d. Potts *v.* Dowdall, 3 Houst. (Del.) 369. The facts were these: Menough, who in and before 1849 appears to have been well seised of the premises, conveyed them in that year with covenants of warranty to Boyd, whose deed was placed upon record in November. In the next year, 1850, Menough conveyed the same premises to Dowdall by deed containing all the covenants for title, and it may be assumed, as was stated by the court but not contained in the case stated, that this deed was so expressed as to purport to convey to Dowdall, and to the fullest extent, an absolute title to the premises. Under this deed, Dowdall went at once into possession of the premises, and thereafter continuously received the rents and profits. Then, in 1851, Boyd reconveyed the premises to Menough, who in 1853 conveyed them in mortgage, under foreclosure of which they were sold to the lessor of the plaintiff, who brought ejectment against Dowdall. Now, apart from the question of possession, the case would, under the registry laws, have seemed to be clear for the plaintiff, for unless Dowdall took his deed without regard to the state of the registry (which of course would have been negligent), he would have found, on searching the latter, the recorded deed from Menough to Boyd, and must therefore be deemed to have acquired title with constructive notice of that deed. Then, when the mortgagees lent their money, they were only bound to search for conveyances as follows: first, against Menough, from the time he acquired title until 1849, when he conveyed to Boyd; secondly, against Boyd, between 1849, when Menough thus conveyed to him, and 1851, when he conveyed to Menough; and thirdly, against Menough, from 1851, when Boyd thus conveyed to him, until 1853, when they took their mortgage; but they were not bound to search for conveyances by Menough after 1849, when he had conveyed the good title to Boyd. But the conveyance from Menough to Dowdall in 1850 was not in the line of search, and the mortgagees were, under the registry acts, purchasers without notice of this conveyance, as much as if it had not been recorded at all. But the protection thus afforded them by the registry acts failed

§ 261. The question arising in such cases involves a conflict between principles; the old one, of notice from possession, and the more modern one, that an unbroken series of registered conveyances, or other devolutions of title which are matters of record, makes a good title. The Delaware court decided that the former must prevail, and as matter of fidelity to established principle this cannot be criticised.

At the same time it may be suggested that when the protection of the registry acts is thus made to yield to the notice afforded by possession, uncertainty of title must necessarily result. It is familiar that although possession for the required time under the limitation acts will produce a title which is not only good but marketable, yet that practically the objection lies that its validity depends upon matter of evidence rather than of law. So with regard to possession as connected with notice; possession is matter of fact, often called in question, and often needing the decision of a jury. In the case of a sale, it may be that the vendee's desire of immediate possession will induce the inquiry whether it can be had, and the consequent discovery of the rights of any one in possession; but in the case of a mortgage it is believed that, as matter of practice, a mortgagee rarely concerns himself as to who may be in possession, and would hardly be deemed guilty of negligence in not inquiring. And yet, by this application of the law of notice, it would seem that he, equally with a purchaser, is bound to inquire. Furthermore, it may be questioned whether a purchaser who has neglected to ascertain whether his vendor has title or not, or who has intended to run the risk of the title, ought to be allowed to set up notice from his possession against one who has used all legal means of ascertaining his title.

It would seem, however, that the correction of this uncertainty

in view of the fact that Dowdall was in possession, and inquiry of him by the mortgagees would have disclosed the fact that he claimed under the conveyance from Menough in 1850, which would give him an equity to demand the transfer of the title which Menough subsequently acquired by the reconveyance in 1851 from Boyd to himself of the good title which had been conveyed to the latter by Menough. The decision of the case seems rather to have rested upon the application of the doctrine of estoppel as adopted in the American cases; but, with the element in the case of Dowdall's possession, the decision could not have been otherwise. In referring to the cases of Fairbanks *v.* Williamson, 7 Greenl. (Me.) 96, and Pike *v.* Galvin, 29 Me. 185, *supra*, p. 367, n. 1, p. 370, n. 4, the court considered the former case, which was overruled by the latter, to be the sounder decision.

is matter rather for the legislature than the courts, and the statutes already referred to show, not uncertainly, the legislative disposition to uphold the rights of the purchaser of a defective title.[1] And as against such statutes, neither the protection of the registry acts nor any other can avail; nor, it would seem, is the question of possession of any importance one way or the other.[2] It may be matter of grave question whether such legislation does not operate as a practical repeal of the registry acts.

§ 262. As respects the law as it is held in England, it will be found that in no case (except one, not now regarded as authority[3]) has it ever been held that the after-acquired estate *actually passes* by estoppel, or that its acquisition does more than merely create an equity for a conveyance.

Thus in the old case of Taylor *v.* Debar,[4] "A purchaser of the crown lands in the time of the late wars sells part to the plaintiff, and covenants to make further assurance. He, on the king's restitution, had a lease for years made to him under the king's title. The decree was, he should assign his term in the part he sold."

So in a modern case, a contingent remainderman conveyed his

[1] *Supra*, § 248.

[2] *Supra*, § 259.

[3] Bensley *v.* Burdon, 2 Sim. & Stu. 524. In this case (referred to *supra*, p. 421, n. 1), Vice-Chancellor Leach treated an estoppel caused by a deed of lease and release as possessing the high efficacy of actually transferring the estate. But the authority of this case was soon after indirectly, if not positively, denied by the King's Bench in Right *v.* Bucknell, 2 Barn. & Ad. 273 (see the opinion of the court, *supra*, p. 362, n. 3); and Sugden, who had himself, in Bensley *v.* Burdon, argued in favor of the estoppel, afterwards said, when Chancellor of Ireland, in Lloyd *v.* Lloyd, 4 Dru. & War. 369, 2 Conn. & Lawson, 598, (the report in the first of these books is the more full,) that it was now clearly settled that a conveyance of this nature has no effect upon the legal estate which the party subsequently acquires.

In Doe d. Hutchinson *v.* Prestwidge, 4 Maule & Selw. 178, one of three tenants in common in tail released to the others with a covenant of warranty. By the death of one of the latter the releasor became his heir, and conveyed his interest in the premises to the plaintiff, who brought suit for the same against the children of the other tenant in common, who had also died, for whom it was contended that whether this warranty passed the right or might be used only by way of rebutter was immaterial to the defendants; in either case the plaintiffs were not entitled, for they could not stand in a better position than the releasor himself, "and the court having intimated an opinion that the lessors of the plaintiff were barred by the release in respect of so much of the releasor's interest as the plaintiffs took under the release," the defendant's counsel "made another point, viz. that whatever interest passed by the release passed to the releasees as joint tenants and not as tenants in common," but this was subsequently abandoned, "wherefore judgment passed for the defendants."

[4] 1 Ch. Cas. 274; s. c. *nom.* Taylor *v.* Dabar, 2 id. 212.

interest therein, with a covenant for further assurance, to secure a debt, but by the act of the tenant of the prior estate this remainder was destroyed, and the remainderman subsequently acquired a new interest in the property, and it was held that this subsequent title was available to the creditor, and Shadwell, V. C., said, "I do not place much reliance upon this covenant for further assurance, because I take the law to be this: that if a person has conveyed a defective title, and he afterwards acquires a good title, this court will make that good title available to make the conveyance effectual."[1]

In the recent case of Heath *v.* Crealock,[2] trust funds were lent on mortgage by two trustees, and the title deeds delivered to one of them who was a solicitor, and who was also the solicitor of the mortgagor. With the concurrence of the solicitor trustee, and without the knowledge of the co-trustee, the mortgagor sold part of the land to a purchaser without notice of the mortgage. The deeds to the purchasers contained recitals that the grantor was

[1] Noel *v.* Bewley, 3 Simons, 103. In Smith *v.* Baker, 1 Younge & Coll. 223, the decision was to the same effect, and the covenants were not alluded to in the opinion.

In Morse *v.* Faulkner, 1 Anst. 11; s. c. 3 Swans. 429, n. (where the report is more full), a bill filed against the heirs of one who sold a property, which he did not possess till afterwards, was dismissed; but the case is no authority on the point, for Chief Baron Eyre said: "Really I do not think it necessary to go into the general question upon this occasion. This is not the sort of sale that it becomes the court to take notice of. A common soldier goes down to a country alehouse, and late at night calls together two or three people, and offers to sell his estate, and then two persons bid for it, and the affair is all over. The transaction is not serious enough for this court to interfere with." Sugden, relying apparently on the report in 1 Anst., thought the case of some importance, and said of it: "It seems to have been considered that this [duty to convey the estate to the purchaser as soon as the vendor acquires title] is a personal equity attaching on the conscience of the party and not descending with the land, and therefore that if the vendor do not in his lifetime confirm the title, and the estate descend to the heir at law, he will not be bound by his ancestor's contract. This opinion, however, deserves great consideration." 2 Sugd. Vend. (14th ed.) 745. But Chief Baron Eyre in Morse *v.* Faulkner spoke by no means positively as to this doctrine of mere *personal* equity, and expressly said, "I shall not determine the case upon this ground without further consideration." Afterwards, when Chancellor of Ireland, in Averall *v.* Wade, Lloyd & Goold, 261, Sugden said: "The only case I recollect on the subject is Morse *v.* Faulkner; there the party was not entitled at the time of the conveyance, but afterwards acquired the title by descent, and the court seemed to think that this was a personal equity, and not descending with the land. I am not of that opinion." And in Jones *v.* Kearney, 1 Dru. & War. 159, the Chancellor, referring to Morse *v.* Faulkner, said, "I had always thought that no good reason could be given why the contract should be binding upon the ancestor, and not upon the heir."

[2] L. R. 18 Eq. 215; on appeal, 10 Ch. App. 30.

"seised or otherwise well and sufficiently entitled for an estate of inheritance in fee simple in possession, free from all incumbrances," and contained also the usual covenants for title and for further assurance. The solicitor trustee received the purchase money from the mortgagor and promised him to obtain a reconveyance from his co-trustee. Eleven years afterward, the mortgagor, learning that the solicitor trustee had misappropriated the fund, insisted upon the promised reconveyance, whereupon the solicitor trustee induced his co-trustee to join him in such reconveyance, representing that the mortgagor was about to sell. The solicitor trustee then absconded, and his co-trustee filed a bill against the mortgagor and purchasers from the latter, praying that the deed of reconveyance be delivered up to be cancelled, for an account of the amount due on the mortgage, and in default of payment a foreclosure, and that upon such foreclosure the title deeds be delivered to the plaintiff. It was contended for the purchasers that they had obtained the legal estate, because although the mortgagor did not have it when he executed the deeds to them, yet he afterward obtained it by the reconveyance, and it then fed the estoppel created by his deeds. The case first came up before Bacon, V. C., who said: "If [the mortgagor], having sold and conveyed to the defendants, the purchasers, without a title, had afterwards obtained a perfect title, then, as between him and them, his subsequent title would no doubt have fed the estoppel, and would entitle them to have their originally defective title made perfect by him. But the principle of estoppel applies only between parties and privies, and if the estate supposed to be acquired by the mortgagor under the reconveyance is destroyed by the cancellation of that conveyance, and before any estate can have passed from him to them, there can exist no food for the supposed estoppel, and the purchasers are reduced to the position in which they would have been if no reconveyance had been executed; it being wholly out of the question to suggest that any equity exists as between them and the plaintiff." And the decree prayed for was made. On appeal, this decree was affirmed,[1] Lord Cairns saying: "There is no estoppel whatever in this case. The conveyances to the purchasers were innocent. They were ordinary

[1] 10 Ch. App. 30. With a modification as to the return of the title deeds, this being contrary to the rule in the case of a purchaser for valuable consideration without notice.

conveyances by grant, the operative words of which, as is well known, would create no estoppel; and the estoppel, if it arose at all, would arise by virtue of the first recital in the conveyance. The recital was in substance the ordinary one in such cases. It recited that [the mortgagor] was seised or otherwise well and sufficiently entitled to the property in question free from incumbrances. If the recital had been a recital simply that [the mortgagor] was seised, there might have been an estoppel, but the recital is one out of which no estoppel can arise, because it is not precise or unambiguous. It is a recital which in substance amounts to a statement that he had an estate either at law or in equity, and the fact that it states that the estate, whatever it was, was free from incumbrances, creates no estoppel for the purpose of making the legal estate pass. There is, therefore, no estoppel operating so as to convey the legal estate to the purchasers." [1]

In the still more recent case of General Finance Company *v.* Liberator Society,[2] the question of estoppel was again presented. Briefly, the facts were these.[3] White being, in 1872, the owner of certain premises, conveyed them in mortgage to Risdon. On May 14, 1873, Downs, who had no title to the property, conveyed it in mortgage to the plaintiffs. The mortgage deed contained no recitals, but there were the usual mortgagor's covenants for title including a covenant that he had full power to convey, and with the mortgage he handed to his mortgagees two deeds purporting to be the title deeds, but which were afterwards discovered to be forged. On May 20, 1873, White (the owner of the premises

[1] Mellish, L. J., in his concurring opinion, agreed with what the Chancellor had said as to the estoppel. "It would have been a question of some difficulty whether, if the legal estate had, no matter by what means, got into the purchasers, it could have been got out of them; but in my opinion it is clear that it has not, for there is no estoppel, and I think the case is governed by that of Right d. Jefferys *v.* Bucknell, 2 B. & Ad. 278," *supra*, p. 362, n. 3.

As to the covenant for further assurance, Lord Cairns considered that as it could only apply to title afterward acquired by fair means, it was not violated by a decree of foreclosure, or, in other words, that such a decree did not take away from the purchasers anything to which they were entitled under the covenant. "Suppose the covenant for further assurance had been in this form: 'I [the mortgagor] covenant that if hereafter I should acquire any further interest in this estate, whether I acquire it by fair means or by fraudulent means, I will convey it to you.' Is that a covenant which a purchaser could have enforced? I think clearly not; and yet the purchasers must contend that they are entitled to maintain such a covenant at law and to enforce it; otherwise they cannot object to this decree on that ground."

[2] L. R. 10 Ch. Div. 15.

[3] In no class of cases to be found in the books are the facts so complicated as in those under this branch of the law of estoppel.

subject to the mortgage of 1872) and Risdon (the holder of that mortgage) conveyed the property to Downs, clear of the mortgage, and Downs thereupon mortgaged the property to the defendants to secure moneys advanced by them to him to enable him to complete his purchase, and he put them in possession. The genuine title papers were, upon this transaction, handed to Downs, and by him to the defendants, the latter having no notice of the mortgage of May, 1873, from Downs to the plaintiffs, and the questions were, first, whether the defendants or the plaintiffs had priority, and secondly, whether the defendants were bound to deliver up to the plaintiffs possession of the property and the title deeds. It was urged for the plaintiffs that they claimed to have a title by estoppel,[1] but in the course of the argument, Sir George Jessel, M. R., asked the question, "Can you produce any authority for the proposition that an estoppel can be created by covenant?" and it was but lamely answered,[2] and without calling upon the defendants' counsel he decided both questions in their favor, considering that the doctrine of estoppel "by which falsehood is made to have the effect of truth" did not apply to the case. "No decided case has been produced," said he, "in which it has been held that the covenant that a man has a thing shall be considered as equivalent to a positive statement that he has it; and therefore there is no authority in all the long line of cases which makes a covenant sufficient."[3]

[1] The argument being, "Although at the time Downs executed his mortgage to us he held no legal estate, he — and all persons claiming under him — became, by virtue of that mortgage, estopped from denying that he had the legal estate; and the estoppel so created was 'fed' by the legal estate which he afterwards acquired under the conveyance to him from White and his mortgagees, so that the legal estate thus became complete."

[2] "We have not been able," replied counsel, "to find any direct decision upon the point in the book, or in any of the cases on estoppel collected in Dart's Vendors and Purchasers (5th ed., p. 810); but there is authority that in order to ascertain whether a deed contains a sufficient averment of title, you must look at the whole deed and not merely at one particular part of it."

[3] The Master of the Rolls in his judgment said: "The whole doctrine of estoppel of this kind, which is a fictitious statement treated as true, might have been founded on reason, but I am not sure that it was. There is another kind of estoppel — estoppel by representation — which is founded upon reason, and it is founded upon decision also. It is quite plain that it is not every representation that will do for an estoppel, and it is not every statement that will do. In order to find out what sort of statement will do, you must have recourse to authority; and, as far as I am concerned, I shall treat the authorities as binding and conclusive, for I am not going to inquire how they came to be decided in the way they were: there they are." He then considered the cases of Heath *v.* Crealock, Bensley *v.* Burdon, and Right *v.* Bucknell, (*supra*,) and ended by

It would thus sufficiently appear that in England at the present day the effect of the doctrine of estoppel as applied to the actual transfer of title of the after-acquired estate is absolutely denied, and especially when it is invoked as against an innocent purchaser without notice.[1]

saying: "The covenant is an agreement that if the mortgagor has not the power to convey the legal estate he will be liable in damages; it is an agreement that he shall be treated as having it, and so be liable to an action if the statement turns out to be untrue: that is what it means. The covenant has no other meaning, it is not a mere assertion that he has the legal estate, but an agreement really that if he has it not, he will pay for it. It is a bargain that he has the power to convey, but not an assertion that he has the estate; and so it does not appear to me to be at all clear that that would amount to that precise averment of a fact which is necessary in order to support the doctrine that a subsequent conveyance of the legal estate will, so to say, fill up the estoppel previously created. The last remark I think it necessary to make is this — that I see no reason for extending the doctrine. It can have no operation except in the case of third parties who are innocent of fraud and who have become owners for value; and there can be no reason — as I intimated at the beginning of my judgment — that I am aware of, for preferring one innocent purchaser for value to another. As against the man himself or persons claiming without value, the purchaser of the mortgage can recover without any recourse to estoppel at all; therefore, considering especially that the jurisdiction in equity and common law is now vested in every court of justice, so that no action for ejectment, or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where the plaintiff has the title to the possession, I think I ought not to attempt in any way to extend this doctrine by which falsehood is made to have the effect of truth. The doctrine appears no longer necessary in law; it appears no longer useful, and, in my opinion, should not be carried further than a judge is obliged to carry it."

[1] The law, though well settled, had been less definitively announced in England when the fourth edition of this treatise was published, and the author has omitted herefrom the somewhat elaborate notice in it of some cases (Bensley *v.* Burdon, 2 Sim. & Stu. 524; Faussett *v.* Carpenter, 2 Dow & Cl. 232; Davis *v.* Tollemache, 2 Jurist, N. S., 1181) whose careful consideration seems now no longer necessary. Of Davis *v.* Tollemache, it need only be said that the defendant, who was tenant in tail in remainder, mortgaged the estate with the usual covenant for further assurance. Subsequently, the estate tail became vested in him in possession, and a disentailing deed was thereupon tendered to him for execution, in order, as was claimed, that he might comply with the covenant for further assurance, and on his refusal, upon a bill filed to compel specific performance of the covenant, Stuart, V. C., said, "I can find no contract in this deed for enlarging the estate of the grantor to any extent; and I conceive that unless there be words in the instrument which can show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring interest in other persons than the grantor, the court is not justified in resorting to its extraordinary jurisdiction for specific performance to compel the grantor to execute an assurance of a kind that was not, and could not from the form of the instrument be thought to be, in his contemplation at the time when the grant by him was made," and the demurrer to the bill was allowed, and afterwards the bill was dismissed. See this case further referred to, *infra*, Ch. XV. This case was relied on by the defendant in Bankes *v.* Small, L. R. 34 Ch. D. 415, where a tenant in tail in remainder, who had disentailed without the concurrence of the tenant for life, and had sold with a covenant that he would execute every such disentailing and other assurance as the purchaser should reasonably require, and afterwards the tenant in tail died, but the

§ 263. It is believed that a careful examination of the hundreds of American cases upon this subject will show that in spite of a few mistakes in point of doctrine, and mistakes still fewer in consequence of practically enforcing results as logical deductions therefrom, the true doctrine to be deduced from them can, with a single exception, be practically applied not only without disturbing any of the landmarks of the law, but in strict consonance with the general principles of jurisprudence.

§ 264. The following propositions may perhaps embody and harmonize the very large number of authorities upon the subject: —

I. The doctrine of the passage of the after-acquired estate rests upon a principle which is, or at times may be, salutary, being intended to carry out the real intention of the parties that a certain particular estate was to be conveyed and received; and where that intention appears, the law will not suffer the grantor to defeat it.[1]

II. Such an intention may be deduced either from averments, recitals, or the like, or from the presence of covenants for title, and it is immaterial what particular covenants these may be, so that they show the intention.[2]

III. But the intention is not *necessarily* deduced from the covenants, and may appear by other parts of the deed.[3]

IV. In many cases, to prevent circuity of action, it may be innocently held that the estate *actually passes*.[4]

V. But this should not be suffered to work injustice by depriving the first grantee of his legal right of action, i. e. his option to sue for breach of covenant.[5]

VI. And the doctrine may often properly apply when there is *no* right of action.[6]

VII. But the doctrine should *never* be applied against a purchaser without notice.[7]

§ 265. It may well be doubted whether the elaborate learning

case was held not to apply. Kekewich, J., said that in the covenant in the deed before him it must have been intended that when an opportunity arose, and a disentailing assurance could be properly executed, it should be done, which was much more than was covenanted for in Davis *v.* Tollemache. In other words, the contracts in the two cases were different.

[1] *Supra*, §§ 245, 248.

[2] *Supra*, §§ 248, 252, 255.

[3] *Supra*, § 255.

[4] That is to say, where the question arises between grantor and grantee, *supra*, § 256.

[5] *Supra*, § 258.

[6] *Supra*, § 251.

[7] *Supra*, § 259 *et seq.*

by which the doctrine is sought to be deduced from and connected with the law of warranty or the modern covenants for title, under the branch of estoppel, has any application whatever to such law. Practically it has not, for it has been seen that the doctrine is applied not only where all remedies growing out of warranty or of covenant are wanting, but where, in the absence of covenants, it is made to depend upon *intention*, indicated by recital or otherwise. No one can fail to perceive that with few exceptions the cases which have taken up this doctrine were correctly decided upon the facts presented, and objection should lie rather to the grounds of the decisions, which are sought to be based upon common law instead of upon equitable doctrine. For the result of the cases would seem to show that instead of giving effect to a rule of the common law, they are in fact administering equity through the medium of common law forms; in other words, that they are enforcing the rights of the first purchaser as against his grantor as if upon a bill filed by the former to compel the transfer of the after-acquired title; for to contend that such title actually passes *by force of the covenants* is met by the cloud of decisions where either there are no covenants at all, or where they are inapplicable or fail of effect, and yet where the subsequent title is held to pass. This ground failing, the doctrine resolves itself into that recognized and applied in England from the earliest cases to the present day; namely, that where one purports to convey a good title to another and afterwards acquires the same land under another title, there is *an equity* arising out of the contract to fasten it upon the new title. But the purchaser has no rights at law; he can only enforce them in equity. Coming then into equity, when his bill is filed against his grantor or all claiming under him *as privies*, he properly obtains relief. A subsequent purchaser from the grantor, however, has a stronger position than the grantor or his privies, and the statutory protection given *him* by the registry acts would, if there were no more in the case, prevail over the equity of the first purchaser. But again, there may come in still another equity on behalf of this first purchaser, viz. notice to the second purchaser, either by possession or any other recognized kind of notice, and this will in turn prevail against the protection of the registry acts. And if we accept the proposition that the American courts have practically been administering these equi-

ties through the medium of common law forms, as is done at the present day in England, and in an increasing number of our own States, all technical difficulties disappear, and the cases are consistent, if not logical as to doctrine.[1] The doctrine, however, ceases to have any necessary connection with the law of covenants for title, and ceases to have any connection with the common law doctrine of estoppel.

This would serve to harmonize all the cases except those which hold that the subsequent title passes to the first grantee, as against a subsequent purchaser *without* notice. These cases are wholly indefensible, and are opposed not only to the registry acts at law, but also to elementary principles of equity. Nor can such cases be sustained upon the ground that the doctrine has become a rule of property, for there is no rule of property involved in protecting a negligent purchaser who buys what his vendor has not got to sell.

§ 266. It sometimes happens that a purchaser in giving to his vendor a mortgage for the purchase money is required to insert in it general or absolute covenants for the title, and it has been at times urged that he is estopped by these covenants from availing himself of any indemnity or relief to which he would otherwise be entitled by virtue of his vendor's covenants to himself. This strange contention is sought to be based upon the doctrine that "estoppels should be reciprocal," but has no foundation either in reason or authority.[2] Although the question was left undecided

[1] In other words, in the majority of the cases decided, the courts, in endeavoring to administer substantial justice, have unconsciously been administering the doctrines of equity, although professedly basing the result upon certain supposed rules of the common law which really have no existence, and the decisions have practically been reached by considering, first, what was the contract or intention of the original parties, (namely, whether a fee simple or other definite estate was or was not intended to be conveyed,) and secondly, whether the rights of any innocent third party had intervened; and when it is found that the contract was for such a definite estate, and that no intermediate rights have intervened, or if there be a second purchaser, that such purchaser is so affected with the doctrine of notice — whether from record, possession, or other causes — that he might be a defendant against whom a decree would be obtained in a court of equity, then the subsequent title is decreed to be conveyed to the first purchaser, or, what is in a court of law substantially the same thing, treated as having been conveyed or as having actually passed; and *aliter*, where equity would *not* decree a conveyance, or affect a second purchaser with notice, *a fortiori* in a court of law the estate will not be considered as having passed to his grantee.

[2] In Lot *v.* Thomas, Penn. (N. J.) 300, the court said: "If this doctrine were true, Lord Coke was not only justified in saying that estoppels were odious in law, but he might have gone further and added that they were detestable."

in a case in Massachusetts,[1] yet in one more recent it was held that the law of estoppel was inapplicable to such a case.[2] It is of course true that in general where a mortgage containing a general covenant of warranty is given, the mortgagor cannot set up an after-acquired estate to defeat his mortgagee's recovery,[3] yet this does not apply when the deed and mortgage are part of one and the same transaction, and the estate mortgaged is and purports to be no greater and no less than the estate conveyed.[4] The doctrine was stated with clearness in a case in New Hampshire,[5] where, in a suit brought by a mortgagor upon covenants contained in a deed made to him on the same day by the mortgagee, the court said: "The plaintiff's covenant is a direct allegation that there was no incumbrance when he made his deed, but it is no

[1] Fitch *v.* Seymour, 9 Met. (Mass.) 468.

[2] Sumner *v.* Barnard, 12 id. 461.

[3] Cross *v.* Robinson, 21 Conn. 387; Plowman *v.* Shidler, 36 Ind. 484 (where the court said, "The fifth paragraph alleges that at the date of the mortgage the defendants had not, nor have they at any time since had, any title to the mortgaged property. This answer is merely trifling, and deserves no further notice than to say it was bad, and the demurrer was properly sustained to it"); Boone *v.* Armstrong, 87 id. 169; Randall *v.* Lower, 98 id. 256.

[4] For as was said in Randall *v.* Lower, *supra*, "By all the analogies of the law, upon all the principles of equity, a covenantor in a deed occupies towards one who mortgages back the land granted to him a position very different from that occupied by a mortgagee who did not undertake to create title in his mortgage. . . . Equity does not require that a grantee should mortgage back a greater estate than that his grantor professed to vest in him, nor can it be implied that a grantee in mortgaging back the land for the purchase money intended to grant an estate which the deed assumed to grant but which it did not vest in him." The only decision at variance with such an obvious doctrine seems to be Hitchcock *v.* Fortier, 65 Ill. 239, where Fortier in 1849, having a defective or no title, sold to McFadden who conveyed the premises in mortgage to his vendor, both deed and mortgage containing covenants of warranty. The next year, McFadden bought the paramount title, and in 1855 mortgaged the property, and in an action of foreclosure by Fortier, the first mortgagee, the question was between her mortgage in 1849 and the second mortgage in 1855, and the court, referring to the argument on behalf of the latter that the title acquired by McFadden from the paramount owner should not inure to the benefit of Fortier, because the covenants in the mortgage to the latter should be considered as relating only to the estate acquired by Fortier from McFadden, said, "There is, at its first presentation, a certain plausibility in this view, but we do not, on consideration, deem it sound," and without the citation of authority decided in favor of the first mortgage. The authority of this decision was properly denied in Randall *v.* Lower, *supra*, and Mr. Bigelow (Estoppel, 4th ed., 404) justly pronounces it "not well considered," and it seems only necessary to suggest first, that upon the merits the vendor of an imperfect title, which presumably may have been sold at a proportionately reduced price, should not be allowed to profit by his purchaser's subsequent acquisition of a title not derived from him, and secondly, that under the recording acts the second mortgagee was not obliged to search for mortgages prior to the time (1850) when his mortgagor acquired the valid title.

[5] Haynes *v.* Stevens, 11 N. H. 32.

admission that there was no incumbrance when the defendant made *his* deed. How does the covenant estop him from showing that there was no incumbrance at the date of his own deed in a suit against him on his covenant? The defendant's deed must have preceded the plaintiff's deed. A warranty of title by the plaintiff does not prove that the defendant had title when he conveyed, for the plaintiff might then, or immediately after, have purchased in an opposing title, or removed an incumbrance. The fact that the plaintiff had a title when he thus reconveyed is perfectly consistent with the fact that the defendant had not a title when he conveyed to the plaintiff. Could it be said, if the defendants had mortgaged the land and then conveyed to the plaintiff, who mortgaged to the defendant, and then the plaintiff had extinguished the first mortgage, that the plaintiff should not recover of the defendants the sum he had thus paid, because his mortgage contained a covenant against incumbrances? True, he covenants against incumbrances, but it is against those of his own creation, and not such as the defendants may have charged upon the land." So in a case in Maine,[1] one sold land with a general covenant of warranty, taking a purchase money mortgage containing a similar covenant. The mortgage was subsequently assigned and afterwards foreclosed. The mortgagee died insolvent, when his widow, who had not joined in the original conveyance, recovered her dower, which was paid by the owner of the land, who then sued on the covenant in the mortgage. But the court, in giving judgment for the defendant, said that when both a deed and the mortgage for the purchase money "contain covenants of warranty, the covenants are not considered to be mutually acted upon each by the other; those in the mortgage do not estop the party claiming to recover upon those in the absolute deed.[2] The grantor in the absolute deed had sold the land; the mortgagee had pledged it only, for the security of the purchase money. By the sale the grantor received a consideration, and is bound by his covenants to indemnify the grantee for all defects in the title, and for incumbrances existing at the time of the conveyance.[3] As between these parties, the purchaser really pledges nothing but the interest which he obtained

[1] Smith *v.* Cannell, 32 Me. 125.
[2] Citing Brown *v.* Staples, 23 id. 497.
[3] Citing Haynes *v.* Stevens, 11 N. H. 28.

under the deed to him, and is answerable to him for no imperfection in the title existing before the conveyance. If the mortgage is redeemed, it has discharged its office as security, and ceases to be operative. If it is foreclosed, the title which passes by the absolute deed is restored to the grantor or those who claim under him. And the one having the mortgagee's right after foreclosure of the mortgage cannot be allowed to recover damages for a breach of the covenants therein made by the mortgagee, or existing at the time of his conveyance; for the effect of such recovery would be to obtain all that he parted with in the conveyance, and the value of the incumbrance which he is relieved from removing by the foreclosure. Such consequence would be unjust." And the law as thus stated is supported both by reason and authority.[1]

Where, however, in a case in Massachusetts, the grantee in a deed containing covenants for title had mortgaged his estate to his grantor, and afterwards, by giving the latter possession under the mortgage became his tenant and was evicted by an elder title, it was held that the former was not entitled to sue upon the covenants in the deed to himself while such a relation between the parties continued unchanged; the eviction had not been of *his* possession, but of that of his grantor and mortgagee.[2]

[1] Hubbard *v.* Norton, 10 Conn. 433; Hardy *v.* Nelson, 27 Me. 528; Brown *v.* Staples, 28 id. 497; Smith *v.* Cannell, 32 id. 123, *supra;* Sumner *v.* Barnard, 12 Met. (Mass.) 461; Hancock *v.* Carlton, 6 Gray, (Mass.) 61; Pike *v.* Goodnow, 12 Allen, (Mass.) 474; Brown *v.* Phillips, 40 Mich. 264; Geyer *v.* Girard, 22 Mo. 160; Connor *v.* Eddy, 25 id. 72, where the text was cited, and it was said that "the law of estoppel has no application in such cases;" Lot *v.* Thomas, Penn. (N. J.) 300. So, "if a man makes a feoffment with warranty, who enfeoffs the first feoffor upon condition that that warranty remains, and he shall vouch by reason of the first warranty." Bointon & Chester's case, cited in Rolls & Osborn's case, 4 Leon. 251. So, in Co. Litt. 390, it is said, "If a man make a feoffment in fee, with warranty to the feoffee his heirs and assigns, and the feoffee re-enfeoffeth the feoffor and his wife, or the feoffor and any other stranger, the warranty remaineth still; or if two make a feoffment with warranty to one and his heirs and assigns, and the feoffee re-enfeoffeth one of the feoffors, the warranty doth also remain." So it was held in Kellog *v.* Wood, 4 Paige, (N. Y.) 77, that a general warranty in a reconveyance made by a vendee to his vendor will extend only to incumbrances suffered by the former while he held the estate. See also Ingalls *v.* Cooke, 21 Io. 560.

Mr. Bigelow says, "The case of a mortgage given back by the purchaser to the vendor of an estate stands on a footing of its own. . . . The authorities indicate some divergence in regard to the ground of the rule, but the rule itself is clear." Estoppel (4th ed.), 403, 404.

[2] Gilman *v.* Haven, 11 Cush. (Mass.) 330.

§ 267. The rule which in this country sanctions the admission of evidence to show that the consideration of a purchase was in reality greater or less than that expressed in the deed, has already been adverted to.[1] But the rule has been carried somewhat further than merely to sanction the admission of evidence to increase or diminish the consideration as to amount. Thus in a case in New Jersey,[2] the plaintiff by a deed containing a covenant against incumbrances conveyed land which he had previously mortgaged, and having after the sale discharged the incumbrance sued the purchaser for its amount on the ground that by an agreement between them the latter expressly agreed to pay off the mortgage. It was urged for the defendant that the plaintiff was estopped by his covenant against incumbrances from proving the existence of the mortgage or that the defendant undertook to pay it; but the court held (the Chancellor and three of the judges dissenting) that in the first place the evidence offered was merely to show the nature and extent of the payment of the consideration, and therefore came within the doctrine of the American authorities; and secondly, that the law of estoppel could not apply, as it was said that the question was one merely collateral to the deed, the action not being founded directly upon it. So in Massachusetts,[3] where one having conveyed land with a covenant against incumbrances sued his purchaser in assumpsit for taxes in arrear prior to the date of the deed, on the ground that by the terms of sale the latter had agreed to pay them, the court below rejected the evidence as inadmissible to contradict the covenant, but the judgment was reversed, and it was held that the tendency of the evidence was to prove either that there was no incumbrance on the estate conveyed at the time of the promise, or if there were, that the incumbrance was not within the true meaning of the covenant, as the defendant had previously become bound to pay the taxes. In neither case, therefore, did the evidence vary or contradict the terms of the covenant. If, however, it were not so, the objection would not be applicable to the present case, in which the question as to the construction and effect of the covenant was not raised. It was said, therefore, not to be necessary for the court to give a decided opinion upon the question whether in an action for the breach of the covenant the evidence rejected

[1] *Supra*, § 173 *et seq.*

[2] Bolles *v.* Beach, 2 Zabr. 680.

[3] Preble *v.* Baldwin, 6 Cush. 549.

in this case would be admissible or not,[1] and in other cases the same rule has been approved.[2]

§ 268. The preceding classes of cases have chiefly turned upon the estoppel of the *grantor*. A few, however, may here be noticed respecting the estoppel of the *purchaser* caused by his acceptance of the conveyance.

In some early cases in New York, it was held that the acceptance of a grant was a conclusive admission of the title of the grantor, and therefore that in an action of dower brought by the widow of the latter the defendant was estopped from showing that the husband's title was defective,[3] and the same rule was occasionally applied elsewhere.[4]

[1] For the cases upon this point, see *supra*, § 88.

[2] Drury *v.* Improvement Co., 13 Allen, (Mass.) 168; Strohauer *v.* Voltz, 42 Mich. 444. In the earlier case in Massachusetts of Eveleth *v.* Crouch, 15 Mass. 307, the law had been more strictly held in a case of some apparent hardship. A testatrix sold land to one whom she afterwards appointed her executor, covenanting that she was lawfully seised, had good right to convey, and that the premises were free from incumbrances. The purchaser, being evicted after her death, credited himself, in the settlement of the estate, with $1,000 as damages arising from a breach of these covenants, and in reply to proof that he had himself formerly conveyed the same premises to the testatrix with similar covenants, and that the adverse title was paramount to his own originally and was covered by the covenants he gave, offered to prove that when he originally purchased it was merely as agent for the testatrix, that the consideration was paid by her, that he bought in pursuance of an agreement with her, and conveyed to her without receiving any consideration whatever. It was however held that "to admit the evidence offered would be to permit him directly to contradict his deed, in that he declared himself to be the owner of the land, and to have lawful right to convey it, and his express and unequivocal covenants would be defeated by verbal declarations. . . . If the appellant suffers, it is because he was incautious in the mode of conducting his business." So in New York, it was held in Squire *v.* Harder, 1 Paige, (N. Y.) 495, that one who had conveyed in fee with a covenant of warranty was estopped from alleging that he had such an interest in the consideration money as would raise a resulting trust in his favor.

[3] Hitchcock *v.* Harrington, 6 Johns. (N. Y.) 290; Collins *v.* Torry, 7 id. 278; Davis *v.* Darrow, 12 Wend. (N. Y.) 65; Bowne *v.* Potter, 17 id. 164; Sherwood *v.* Vandenburgh, 2 Hill, (N. Y.) 308. "The objection of the want of seisin in the husband," said Kent, C. J., in Hitchcock *v.* Harrington, *supra*, "cannot be received from the defendants, as they hold under the husband by virtue of conveyances from his son and heir at law. The husband died in possession, and it ought not to be permitted to the heir, or person claiming under him and enjoying the estate, to deny the seisin of the ancestor. . . . The tenant claims title under the seisin of the husband, and cannot be permitted to avail himself of this defence in bar of the demandant's right of dower."

[4] Gayle *v.* Price, 5 Rich. (S. C.) 525; Hains *v.* Gardner, 1 Fairf. (Me.) 383; Hamblin *v.* Bank of Cumberland, 19 Me. 69; Stimpson *v.* Thomaston Bank, 28 id. 259, where it was held that where two grantors conveyed land, with a covenant that they were lawfully seised thereof and would defend the same, the grantee was held to be estopped, in an action of dower by the widow of one of them, from show-

In Massachusetts it was, however, said that "the grantee may be permitted to show that his grantor was not seised, as is every day allowed in actions of covenant;"[1] and in England it has been held that the acceptance of a conveyance did not estop the grantee, in an action of dower brought by his grantor's widow, from showing that the premises were leasehold, instead of freehold as described in the deed.[2]

And in New York, moreover, very soon after the decisions referred to, their rule was followed in one case with reluctance and solely on the ground of adherence to precedent,[3] and soon after, it was held that whatever might be the rule where possession had accompanied the deed, yet where there was no such possession there would be no estoppel.[4] In the later case, however, of Kingman *v.* Sparrow,[5] the whole doctrine was reconsidered on the grounds both of principle and authority, and the prior decisions overruled. The doctrine as given by Coke, that an estoppel was caused "by the acceptance of an estate,"[6] was properly referred, in its application, to the system of common law assurances by feoffment, "which operated on the possession, and if correctly pursued always passed a freehold or fee simple to the feoffee. But in the case of a conveyance by grant, bargain and sale, or release, the very point is whether an estate existed in the grantor, and has passed, to be accepted." The subject was soon after again elaborately reviewed in two cases,[7] and the same view of the law taken, and the case of Sparrow *v.* Kingman was subsequently affirmed on error;[8] so that the law may now be considered as settled in New York, in accordance with principle, that the mere acceptance of a deed, whether with or without covenants, will not estop the grantee from controverting his grantor's title, either as against himself or any one claiming under him,[9] and

ing that the surviving grantor was seised of a greater proportion and the deceased of a less one than an undivided moiety thereof; but the later cases in Maine have, following those in New York, receded from this application of the doctrine of estoppel. See *infra*, p. 431, n. 1.

[1] Small *v.* Proctor, 15 Mass. 495; Fox *v.* Widgery, 4 Greenl. (Me.) 218.

[2] Gaunt *v.* Wainman, 3 Bing. N. C. 69.

[3] Sherwood *v.* Vandenburgh, 2 Hill, (N. Y.) 307.

[4] Osterhout *v.* Shoemaker, 3 Hill, (N. Y.) 518.

[5] 12 Barb. S. C. 208.

[6] Co. Litt. 352 *a*.

[7] Averill *v.* Wilson, 4 Barb. S. C. (N. Y.) 180; Finn *v.* Sleight, 8 id. 406.

[8] Sparrow *v.* Kingman, 1 Comst. (N. Y.) 245.

[9] Of course, however, such a rule does not apply in the case where a vendee obtains and keeps possession of land under a contract of sale *which is not fulfilled;*

the weight of authority throughout the country is now to the same effect.[1]

It has, however, been held that where at the time of the conveyance the purchaser already *has in himself* the valid title to the premises, he is estopped by his acceptance of the conveyance from suing on the covenants it contains,[2] for "they only extend to a title existing in a third person which may defeat the estate granted by the covenantor — they do not embrace a title already vested in him, and it never can be permitted in a person to accept a deed with covenants of seisin, and then turn round upon his grantor and allege that his covenant is broken, for that at the time he accepted the deed he himself was seised of the premises." [3]

§ 269. In a modern English case it seems to have been doubted whether, when a deed contained a recital of title, the *purchaser* upon being evicted was not estopped from denying the accuracy of such recital in an action on his covenants for title,[4] but where the recital was intended to be the statement of one party only, such a doctrine might operate with injustice, and in a subsequent case it was expressly denied, and it was held that when a recital was intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it was an estoppel upon all, but when intended to be that of one party only,

as he will, of course, under such circumstances, be estopped from setting up a defect in the title, either as a defence to an ejectment or in a suit for the purchase money. This, however, obviously depends upon different principles. See the note to Duchess of Kingston's case, 2 Smith's Lead. Cas.

[1] Patterson *v.* Johnson, 113 Ill. 570; Foster *v.* Dwinel, 49 Me. 44; McLeery *v.* McLeery, 65 id. 173 (distinguishing Lewis *v.* Meserve, 61 id. 374); Clee *v.* Seaman, 21 Mich. 287; Macklot *v.* Dubreuil, 9 Mo. 483; Joeckel *v.* Easton, 11 id. 118; Landes *v.* Perkins, 12 id. 239; Blair *v.* Smith, 16 id. 273; Cutter *v.* Waddingham, 33 id. 282. In Gardner *v.* Greene, 5 R. I. 104, it seems to have been held that the acceptance of a deed-poll with covenants of warranty, followed by possession by the grantee, did not estop the latter from disputing the grantor's seisin prior to the conveyance, but in the later case of McCusker *v.* McEvey, 9 id. 535, this was said to be merely *obiter dictum*, and not to be regarded as binding authority. In Massachusetts it was held in Porter *v.* Sullivan, 7 Gray, 441, that the acceptance of a deed with covenants of general warranty of upland on the shore, and of another deed at the same time from the same grantor of the flats in front thereof, with a limited covenant of warranty, did not estop the grantee from claiming title to the latter, and the same doctrine was applied in Craig *v.* Lewis, 110 Mass. 377.

[2] Beebe *v.* Swartwout, 3 Gilm. (Ill.) 179; Furness *v.* Williams, 11 Ill. 229; Fitch *v.* Baldwin, 17 Johns. (N. Y.) 166.

[3] Fitch *v.* Baldwin, *ubi supra*.

[4] Young *v.* Raincock, 7 C. B. 310.

the estoppel was confined to that party.[1] So in Mississippi, it was held that a purchaser who had received a deed with covenant of warranty, "excepting only the widow's right of dower," was not estopped by the exception from denying the fact of the marriage.[2]

[1] Stroughill *v.* Buck, 14 Q. B. 781.
[2] Stevenson *v.* McReary, 12 Sm. & Marsh. (Miss.) 57.

CHAPTER XII.

IMPLIED COVENANTS FOR TITLE, AND HOW COVENANTS MAY BE LIMITED OR QUALIFIED.

§ 270. Both at common law and by statute were certain covenants for title implied in the creation and transfer of estates, whether of freehold or of leasehold. Of these, the earliest was of course warranty, which, as has been already seen, was by the old common law an incident to the creation or transfer of every estate as the return for homage.[1] The lord was bound to warrant or insure the fief against all persons whomsoever claiming by title, and in case of its loss to replace it with another. And when, later, it became usual to authenticate the creation or transfer of estates by charters or deeds, a warranty was, in the case of a freehold, implied from the word of feoffment, *dedi*, but from no other word;[2] and in the case of a leasehold a covenant was implied from the word of leasing, *demisi*, or from any equivalent word, such as *concessi* or the like.[3] So too in the case of an exchange, a warranty was implied from the word of exchange, *excambium*, but from no other word;[4] and finally, in the case of a partition, (which it is familiar was only allowed by the common law as between parceners,) a warranty was implied from the partition itself;[5] and in both of these last cases — exchange and par-

[1] *Supra*, § 2.

[2] Co. Litt. 384 *a*. For although in the statute *de bigamis* (to be presently noticed) "*dedi et concessi* are coupled together, yet these words *ratione doni proprii*, do appropriate the warranty to *dedi* only, and agreeable to this exposition in our books is the common and constant opinion of learned men at this day." 2 Inst. 276. See *infra*, p. 436, n. 3, for some *dicta* to the contrary, now overruled.

[3] Co. Litt. 45 *b*; Andrew's case, Cro. Eliz. 214; Nokes' case, 4 Rep. 81; Spencer's case, 5 id. 16; Touchstone, 160, 165; Mostyn *v.* West Mostyn Co., L. R. 1 C. P. Div. 145. In Style *v.* Hearing, Cro. Jac. 73, it was "resolved by all the justices that upon the words *demise* and *grant*, without other words which comprehend any warranty in them, this action well lies."

[4] Co. Litt. 51 *b*, 384; Gamble *v.* McClure, 69 Pa. 282; Hart *v.* Windsor, 12 M. & W. 68.

[5] Co. Litt. 174; Bustard's case, 4 Rep. 121; Allnatt on Partition, 158; Miller on Partition, 245.

tition — not only was there an implied warranty, but an implied condition of re-entry, which in case of the eviction of either party from the land taken in exchange or allotted in partition gave to the party evicted a right of re-entry on the other portion.[1]

[1] It is true that it has been suggested by distinguished authority that in the creation of a freehold there were other words besides those already mentioned which implied a warranty. Lord Hardwicke is reported to have said, in Mann *v.* Ward, 2 Atk. 228, "When a man has granted and conveyed, be the right real or pretended, the very words *grant* and *convey* imply a warranty and a covenant for quiet enjoyment;" and some years after he again remarked, in Clarke *v.* Samson, 1 Ves. 100, "It is said the word *grant* of itself imports a covenant, which it does at law, but that is where there is no particular covenant, which there is here." Lord Eldon, moreover, when Chief Justice of the Common Pleas, observed in Browning *v.* Wright, 2 Bos. & Pull. 13, "Now these words *granted, bargained, sold, enfeoffed, and confirmed* certainly import a covenant in law, the effect and meaning of which would be affected by the subsequent words of the indenture." To which Buller, J., added: "According to the ancient mode of conveyance, deeds were confined to a very narrow compass. The words *grant* and *enfeoff* amount to a general warranty in law, and have the same force and effect. The covenants, therefore, which have been introduced in more modern times are intended for the protection of the party conveying, and are introduced for the purpose of qualifying the general warranty which the old common law implied." And this, he added, had been settled since Nokes' case. But all these expressions were *dicta*, and no authority whatever was cited in support of them, except by Buller, J. Nokes' case (4 Rep. 81) was not a conveyance of a freehold but a demise of a term; and when it is there said that "for this covenant in law upon these words, *demise, grant*, etc., the assignee shall have a writ of covenant," this is applied only to the case of a lease. See *infra*, § 272. The question whether the words *grant* and *enfeoff* created either a covenant or a warranty in the case of a freehold was presented in Brown *v.* Haywood, 3 Keb. 617, s. c. Freem. 414, and decided in the negative; and in Spencer's case, 5 Rep. 16, "it was resolved by Wray, C. J., and the whole court, that this word (*concessi* or *demisi*), in case of a freehold of inheritance, does not import any warranty." See also Vin. Abr. Covenant, C. 19. Mr. Evans, in a note to Stat. 4 Edw. I. (1 Coll. of Statutes, 192), observes "that it is singular that a judge of such eminence as Mr. J. Buller should have stated that the words *grant* and *enfeoff* amount to a general warranty in law, and have the same force and effect, and should refer to Nokes' case as settling that point, as Nokes' case relates to the demise of a term, in which the words *demise* and *grant* operate as a covenant." But, as has been said, none of these expressions were necessary to the decisions, and in the year 1804 the question was directly presented in New York in Frost *v.* Raymond, 2 Caines, 188, where it was conclusively shown that the words *grant, bargain, sell, alien, and confirm* imply no warranty whatever by the common law in the creation of a freehold, a warranty being implied only from the word *do* or *dedi*. After referring to the warranty implied by the word *grant* in case of a leasehold, Kent, C. J., said: "We are not able to assign a very solid reason for this distinction between the force and effect of the words 'give' and 'grant.' It arose from artificial reasons derived from the feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words or change their established operation. The other words in the deed, 'bargain, sell, alien, and confirm,' have never been considered as implying any covenant whatever in any case. The only *dictum* that appears to oppose the law as now laid down is that of Lord Eldon in the case of

Such was, briefly, the common law as to implied warranty, which was termed "warranty in law."

Its *effect* in these four classes of cases will be considered after we have referred to the statutory alteration of the common law.

§ 271. Its first alteration was by the statute *de bigamis*, which, in the year 1276, limited the warranty implied from the word *dedi* to the life of the grantor in all cases in which homage was not an incident of the tenure.[1] Then when, in 1290, the statute of *quia emptores* practically put an end to homage as an incident of tenure, it of course followed that in every case coming within the statute the word *dedi* implied a warranty during the life of the grantor and no longer.[2] In cases, however, in which privity of estate and tenure still subsisted, as for example where any reversion was left in the donor, the warranty remained as at common law, and therefore "if a man make a gift in tail, or a lease for life of land by deed, or without deed, reserving a rent, or of a

Browning *v.* Wright," and to this view of the law consistent assent has been given in this country. Young *v.* Hargrave, 7 Ohio, 394 (part 2, p. 63); Black *v.* Gilmore, 9 Leigh, (Va.) 449; Gee *v.* Pharr, 5 Ala. 588; Allen *v.* Sayward, 5 Greenl. (Me.) 230; Bates *v.* Foster, 59 Me. 158; Rickets *v.* Dickens, 1 Murph. (N. C.) 346; Deakins *v.* Hollis, 7 Gill & Johns. (Md.) 311; Huntly *v.* Waddell, 12 Ired. L. (N. C.) 33. Lord Eldon's *dictum* was, indeed, directly approved by Huston J., in Christine *v.* Whitehill, 16 Serg. & Rawle, (Pa.) 111, but the case was decided by a bare majority of the court and was overruled in Whitehill *v.* Gotwalt, 3 Pa. (old Pa., not Pa. St.) 326, in an able opinion by Kennedy, J.

[1] *Supra*, § 4. Mr. Bigelow has said (Estoppel, 4th ed., 408, note) in regard to the statute *de bigamis* (4 Ed. I. c. 6): "Writers from Coke down have spoken of this statute as though the warranty was raised by reason of the words 'dedi et concessi.' These words are merely descriptive of the conveyance intended, to wit, a feoffment. The warranty was annexed, because a fief was given." The error thus criticised may be more apparent than real. Unquestionably the warranty resulted from the *fact* of feoffment, not from the *words* used to express it, and this was what the present writer meant in stating (*supra*, § 4) that "the warranty which naturally flowed as part of the reciprocal consequence of feudal tenure could not be modified by an express warranty," and (*infra*, § 275) that "the warranty implied from the word of feoffment, *dedi*, . . . arose, . . . from tenure." But the fact of feoffment had to be expressed by certain words, and the indispensable word was *dedi;* hence it was also indispensable to an implied warranty of an estate in fee, and the use of such expressions as "the warranty implied from the word *dedi*" was perhaps unavoidable.

[2] *Supra*, § 6. And hence the introduction of express warranties, by the word *warrantizo*, became common. Indeed, says Blackstone, "In other forms of alienation gradually introduced since that statute, no warranty whatsoever is implied, they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty to bind the grantor and his heirs, which is a kind of covenant real, and can only be created by the verb *warrantizo*, or warrant." 2 Comm. 300.

rent service by deed, this is a warranty in law, and the donee or lessee being impleaded shall vouch and recover in value." [1]

Of course the old common law knew nothing of a warranty being limited to the acts of the lord only or of those claiming under him — he was bound to warrant and defend the fief against all persons claiming it under paramount title[2] — and when, in later times, warranty was limited to the acts of the grantor himself, or sometimes of particularly named persons, yet this express warranty did not limit or restrain the general implied warranty, and "*dedi* was a general warranty during the life of the feoffor." [3] And, equally of course, the remedy upon an implied warranty was the same as that upon an express warranty,[4] that is to say, by voucher in some cases and by *warrantia chartæ* in others.[5]

But there was a difference between them as to who were bound or benefited by them. In all cases coming within the statutes

[1] Co. Litt. 384 *b*; Fitzh. Nat. Brev. 134. And the burden of this warranty bound the heirs of the grantor and the assignees of the reversion, and its benefit inured to the assignees of the grantee.

[2] Touchstone, 166, 167. But not, of course, against trespassers. See *supra*, § 127.

[3] "For if a man make a feoffment in deed by *dedi*, and in the deed doth warrant the land against J. S. and his heirs, yet *dedi* is a general warranty during the life of the feoffor." Co. Litt. 384. And so says Coke, in Nokes' case, 4 Rep. 81, "I heard the Lord Dyer and the whole court of C. P. (Hil. 14 Reg. Eliz.) resolve that if a man make a feoffment by this word *dedi*, and with express warranty in the deed, he may use the one or the other at his election." So in Rant *v.* Cock, Cro. Eliz. 864; Trenchard *v.* Hoskins, Litt. 64; Johnson *v.* Procter, 1 Bulst. 3; Butler's note to Co. Litt. 384 *a*. It was nevertheless held in Kent *v.* Welch, 7 Johns. (N. Y.) 259, that the covenant implied by the word "give" was restrained by an express covenant for title which the deed might contain, and the decision was based upon Nokes' case, and similar decisions were made in Morris *v.* Harris, 9 Gill, (Md.) 27, and Bricker *v.* Bricker, 11 Ohio St. 240; and see Weiser *v.* Weiser, 5 Watts, (Pa.) 284. Rhea *v.* White, 3 Head, (Tenn.) 126, contains only a *dictum* to that effect; the sale was of a slave. Nokes' case, however, decided that implied covenants in a *leasehold* were, as will be presently seen (*infra*, § 275), restrained by express covenants, but this doctrine was never applied at common law to the implied warranty of a freehold. In Dow *v.* Lewis, 4 Gray, (Mass.) 473, it was said, "That in a feoffment at common law, the word *dedi*, 'give,' implied, in the absence of express covenants, a warranty during the life of the grantor, is well settled. Co. Litt. 384 *a*; 2 Inst. 275. But we know of no authority or sound reason for extending this technical rule to an instrument which purports to be and is but the execution of a power given by statute, and in which the grantor neither assumes to have nor to convey any estate, title, or interest of his own." And hence it was obviously held that no warranty could be implied from the use of this word in a deed from a sheriff or other officer of the law (see *supra*, § 37); and in Webster *v.* Conley, 46 Ill. 14, this case was approved and the same doctrine applied to the case of a lease made without authority by a guardian.

[4] Fitzh. Nat. Brev. 312.

[5] See *supra*, § 11.

de bigamis and *quia emptores*, as the warranty endured no longer than the life of his grantor, his heir was not bound.[1] As to the benefit of the warranty, this in the case of implied warranty descended upon the heir of him who had received the land if the latter died in the lifetime of his warrantor,[2] but it did not pass with the land to an assignee of the warrantee;[3] in other words, the implied warranty did not run with the land. In the case of express warranties, the burden descended upon the heirs of the warrantor, and the benefit to the heirs and assigns of the warrantee, but only when these parties were expressly named.[4]

§ 272. With respect to estates less than freehold, covenants for title were from the earliest times implied not only from the words of leasing, "such as *demisi*, *concessi*, or the like,"[5] but even from

[1] That is to say, the heir was not liable unless the eviction were in the time of the ancestor. But if the ancestor had died after the eviction, no doubt recovery in value could have been had against the heir.

[2] Co. Litt. 384.

[3] For in Spencer's case, "it was resolved that if a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch." 5 Coke, 17.

[4] Co. Litt. 384 *b*.

[5] *Supra*, § 270. And on the other hand the words *yielding and paying* implied a covenant on the part of the lessee to pay the rent reserved. Butler's note to Co. Litt. 384 *a*; Bac. Abr. Covenant, B; Royer *v.* Ake, 3 Pa. (old Pa., not Pa. St.) 465. Some old cases decided that these words have a still larger signification, and make an express covenant; Hellier *v.* Casbard, 1 Sid. 266; Newton *v.* Osborn, Styles, 387; Porter *v.* Swetnam, id. 406–431; but even in their own day their authority was doubted; Anon. 1 Sid. 447; note to Thursby *v.* Plant, 1 Saund. 241; Harper *v.* Burgh, 2 Lev. 206; and later cases have since consistently held that the covenant thus created is implied; Webb *v.* Russell, 3 Term, 393; Mills *v.* Auriol, 4 id. 94; Vyvyan *v.* Arthur, 1 Barn. & Cress. 410; Iggulden *v.* May, 9 Ves. 325; Knuckle *v.* Wynick, 1 Dall. (Pa.) 305; Kimpton *v.* Walker, 9 Verm. 191. The question is of practical importance, as, if the covenant is express, the lessee is still bound to his lessor for the rent, notwithstanding an assignment of the term and acceptance of the rent by the lessor from the assignee; Mills *v.* Auriol, *supra;* Ghegan *v.* Young, 25 Pa. 18; while it is otherwise if the covenant is merely implied; Walker *v.* Physick, 5 Pa. 193; Fanning *v.* Stimson, 13 Io. 42.

In Platt on Covenants, pp. 10–18, the doctrine that a grantee by indenture, executed by the grantor only, is bound by the covenants therein because he has accepted it, was controverted, but admitted to have been perhaps too long sanctioned to be reversed; and it was expressly denied (p. 16) that the law had ever been so held as to a grantee by deed-poll. Platt's view as to deeds-poll was recognized as correct in Pennsylvania and Massachusetts; Maule *v.* Weaver, 7 Pa. 329; Maine *v.* Cumston, 98 Mass. 317; Martin *v.* Drinan, 128 id. 515; but denied in New York and North Carolina; Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Bowen *v.* Beck, 94 id. 86; Maynard *v.* Moore, 76 N. C. 153; and the latter cases would appear to be the better law. In New Jersey, the case of an indenture purporting to be *inter partes*, though executed by the grantor alone, is held an exception to the general rule that covenant can only be brought on an instrument signed and sealed by the defendant or by his authority. Finley *v.* Simpson, 2 Zab. (N. J.) 311 (containing an able examination of the authorities by

the relation of landlord and tenant,[1] and such is the law at the present day,[2] unless where, as in some of the United States, it has been altered by legislation.[3] It is sufficiently obvious, however,

counsel); Sparkman *v.* Gove, 44 N. J. L. 252. In Harrison *v.* Vreeland, 38 id. 366, however, the doctrine of Finley *v.* Simpson was expressly restricted to the case of an indenture, and held not applicable to a deed-poll. In Burbank *v.* Pillsbury, 48 N. H. 475, the point was noticed, but not decided. But as in Pennsylvania it was formerly common, in cases of sales of land reserving a ground-rent, to have the deeds in duplicate, but executed each by one party only, that is, one executed by the grantor conveying the land, and the other by the grantee covenanting to pay the rent, a statute has provided that "in all cases now pending or hereafter to be brought in any court of record in this Commonwealth to enforce the payment of ground-rent due and owing upon lands or tenements held by virtue of any lease for life, or a term of years, or in fee, the lessor, his heirs and assigns, shall have a full and complete remedy therefor by action of covenant against the lessee or lessees, his, her, or their heirs, executors, administrators, or assigns, whether the said premises out of which the rent issues be held by deed-poll or otherwise." Act of 25th April, 1850, § 8, Purdon's Digest, p. 861.

[1] See *infra*, § 274.

[2] Merrill *v.* Frame, 4 Taunt. 329; Baber *v.* Harris, 9 Ad. & Ell. 532; Williams *v.* Burrell, 1 C. B. 402; Frost *v.* Raymond, 2 Caines, (N. Y.) 194; Grannis *v.* Clark, 8 Cow. (N. Y.) 36; Barney *v.* Keith, 4 Wend. (N. Y.) 502; Tone *v.* Brace, 11 Paige, (N. Y.) 569; Sumner *v.* Williams, 8 Mass. 201; Dexter *v.* Manley, 4 Cush. (Mass.) 14; Knapp *v.* Marlboro, 3 Wms. (Verm.) 282; Maeder *v.* City of Carondelet, 26 Mo. 115. It has been denied in New Hampshire that any such effect can be implied from the words "let and lease;" Lovering *v.* Lovering, 13 N. H. 517; and the decision is sought to be based upon the absence of these words in the older authorities. The only difference would seem to be that they use the Latin word *demisi*, of which "I have leased" seems certainly a fair translation (see Maule *v.* Ashmead, 20 Pa. 482, *infra*, p. 440, n. 1); and apart from this, the cases use the expressions "grant, demise, *etc.*," or "grant, demise, *and the like*," which would seem to infer that they meant a covenant to be implied from any words of leasing; and in Eldred *v.* Leahy, 31 Wis. 546, it was considered to be "well settled at common law that a covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land, by whatever form of words the agreement is made." In Black *v.* Gilmore, 9 Leigh, (Va.) 448, the court took it for granted that in a lease the words "rent and lease" would imply a covenant; "for a lease for years is looked upon in the law less as a conveyance of an estate than as a contract for the possession."

[3] The New York Revised Statutes (part 2, c. 1, art. 4, § 140, also Rev. St. 1882, p. 2195) declare that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not" (and a similar enactment is found in Michigan, Minnesota, Oregon, Wisconsin, and Wyoming, see *infra*, § 286); and in Kinney *v.* Watts, 14 Wend. 39, this was held by the Supreme Court to extend to leases, but in Tone *v.* Brace, when before the Vice-Chancellor (1 Cl. Ch. 509), this was denied and the statute held not to extend to leases, they not being "conveyances of real estate" within the meaning of the statute, and this on appeal was affirmed by the Chancellor, 8 Paige, 597; 11 id. 569. In the later case in the Supreme Court of Baxter *v.* Ryerss, 13 Barb. S. C. 284, the correctness of this decision was doubted, but in the subsequent case of Mayor of New York *v.* Mabie, 3 Kern. 160, the Court of Appeals, after citing Tone *v.* Brace, was "satisfied that the construction adopted by the Chancellor is the true one, and that there is nothing in the provision of the Revised Statutes under examination which

that no covenants for title are implied in the *assignment* of a leasehold.[1]

§ 273. The covenants for title thus implied from the words of leasing were and are two — first, a covenant that the lessor has the power to demise,[2] and secondly, a covenant for quiet enjoyment[3] — and both of these covenants are, of course, as are all common law implied covenants, general or unlimited.

prohibits us from finding in the grant in question an implied covenant against the acts of the grantor and others claiming by lawful title. The result would be the same if the question had arisen upon a lease for years of land." And this decision has been approved in the more recent cases in that State; Vernam *v.* Smith, 15 N. Y. 333; Doupe *v.* Genin, 1 Sweeney, 25; Sandford *v.* Travers, 40 N. Y. 144; Mack *v.* Patchin, 42 id. 174; Lynch *v.* Onondaga Salt Co., 64 N. Y. S. C. 558; Boreel *v.* Lawton, 90 N. Y. 293; though in Gallup *v.* Albany Railway, 7 Lans. 471, it seemed to be thought doubtful whether in all leases, without regard to form or language, there is an implied covenant for quiet enjoyment. In Oregon (Gen. L. 1874, p. 516), Michigan (Howell's Stat. 1882, § 5655), Wisconsin (Rev. St. 1873, § 2204), Minnesota (Gen. St. 1881, p. 535), and Wyoming (Comp. L. 1876, p. 5), there are similar statutes to that in New York, and in the first named of these States the same general construction has been given to it. Edwards *v.* Perkins, 7 Or. 149; and see *infra*.

[1] Landydale *v.* Cheyney, Cro. Eliz. 157. "Although the word *grant* or *demise*," it was said in Blair *v.* Rankin, 11 Mo. 442, "create an implied covenant against the lessor, yet it is nowhere said that the same words will, in an assignment, create an implied covenant against the assignor. The object and intent of the parties in making an assignment is to put the assignee in place of the lessee, and when that is done the assignor ceases to have any further concern with the contract unless he has bound himself by express covenants." (In the subsequent case of Woodburn *v.* Renshaw, 32 id. 197, this view of the law must have been taken for granted, or the case would have been differently decided.) So in Waldo *v.* Hall, 14 Mass. 486, one "granted, bargained, and sold" a lease, and the assignee was evicted by a title paramount to that of his assignor, and it was held that the latter was not liable, — that these words created no covenant in an assignment.

[2] Holder *v.* Taylor, Hob. 12; Cloak *v.* Harper, Freem. 121; note to 1 Saund. 329; Frazer *v.* Skey, 2 Chitty, 646; Line *v.* Stephenson, 5 Bing. N. C. 183; Burnett *v.* Lynch, 5 Barn. & Cress. 609, per Littledale, J.; Mostyn *v.* West Mostyn Co., L. R. 1 C. P. Div. 145; Grannis *v.* Clark, 8 Cow. (N. Y.) 36; Crouche *v.* Fowle, 9 N. H. 219; Wade *v.* Halligan, 16 Ill. 508; Streeter *v.* Streeter, 43 id. 161. The words of leasing, however, cannot, it would seem, be made to imply a covenant of greater scope than for title. In Hinde *v.* Gray, 1 Man. & Grang. 413, the defendant demised to the plaintiff a brewery, "and also the exclusive and such other privilege as the defendant then enjoyed of supplying ale, etc. to certain public houses then the defendant's property or under his control, that is to say, the Punch Bowl," etc. The declaration averred, in covenant, that the defendant leased the Punch Bowl to another, who bought his ale elsewhere. On special demurrer, the court held that the declaration should have shown *what* the privilege of the defendant was, and it was doubted if the word *demise* had ever been held to amount to a covenant except when connected with land. And to the same effect are Howard *v.* Doolittle, 3 Duer, (N. Y.) 474; Banks *v.* White, 1 Sn. (Tenn.) 614; Carson *v.* Godley, 26 Pa. 117.

[3] See the cases cited in the preceding note, and Vernam *v.* Smith, 15 N. Y. 332, *supra;* Mayor *v.* Mabie, 3 Kern. (N. Y.) 160; Duff *v.* Wilson, 69 Pa. 318.

§ 274. In the absence, however, of words of leasing, as for instance where the lease is by parol, it is well settled that the law will imply a covenant for quiet enjoyment from the mere relation of landlord and tenant,[1] but it seems to be at least doubtful whether a covenant that the lessor *has the power to demise* will be so implied.

Thus in a case in the Exchequer,[2] the plaintiff declared in

[1] Bandy *v.* Cartwright, 8 Exch. 913; Carson *v.* Godley, 25 Pa. 117; Ross *v.* Dysart, 33 Pa. 453; Dexter *v.* Manley, 4 Cush. (Mass.) 14; and see the other cases hereafter cited in this connection. In the case in Pennsylvania of Maule *v.* Ashmead, 20 Pa. 482, the widow of an intestate made a parol lease for five years, and afterwards, as administratrix, presented a petition to the proper court for the sale of the premises for the payment of the debts of the estate, under which proceeding the tenant was evicted by the purchaser, and brought assumpsit against the administratrix for not having permitted him to enjoy the possession. The court below nonsuited the plaintiff, but this, after being twice argued, was reversed on error, and it was held that the plaintiff was entitled to recover. The court said, per Black, C. J.: "A farm was leased for five years. The tenant went into possession, and improved the property at a great expense of money and labor, so that its produce for the last two years would have been worth much more than it was at any time previous. But at the end of three years he was turned out, and he brings this action to recover compensation for his loss. This is one of those hard cases which sometimes are said to make bad precedents. But every member of the court is clearly of opinion that the law of the case, as well as its merits, is with the plaintiff, and that his technical right to recover is not less plain than the justice of his demand. It is not denied that the word *demisi*, in a lease, implies a covenant for quiet enjoyment during the term. That word was not used here, for the lease was made by parol, and the parties did not understand Latin. But the word *lease* is a fair translation of *demisi*, and ought to be and is interpreted in the same way by the courts." In the argument, the cases of Granger *v.* Collins and Messent *v.* Reynolds were relied on by the defendant, and the Supreme Court had at first determined to affirm the judgment, and the opinion to that effect was written.

[2] Bandy *v.* Cartwright, 8 Exch. 913. In the previous case of Granger *v.* Collins, 6 Mees. & Welsb. 458, the declaration in assumpsit averred that the defendant held the land for the residue of a term of years, and agreed to let the same to the plaintiff, who then agreed to take them at a certain rent, and *in consideration of the premises* the defendant promised the plaintiff that he should quietly hold and enjoy during the said term, but that nevertheless he was evicted by the party entitled to the reversion, and it was held, on demurrer, that the declaration was bad, as, said Lord Abinger, "If the plaintiff originally became tenant to the defendant without any agreement as to the eviction, the law would not afterwards impose such a liability on the defendant as is here stated. No such liability arose from the simple relation of landlord and tenant, and *that*, we think, is the relation on which the plaintiff has declared. The promise is laid more largely than the law will imply from such a relation." The report of this case is rather unsatisfactory, for the covenant attempted to be set up would seem to be for quiet enjoyment rather than for a good title, and this was the understanding of the court in Gano *v.* Vanderveer, (*infra*, p. 442, n. 3,) yet the latter construction alone would warrant the decision. Taking, however, Lord Abinger's reference to the absence of an "agreement as to the eviction" at the time the tenancy began as meaning that there was no covenant for a good title, the case was rightly decided, for there must be an executory considera-

assumpsit upon a demise alleged to have been made on the terms that the defendants had good title to the premises, and that the plaintiff should quietly enjoy them during the term, and alleged that the premises having been distrained upon for non-payment of a paramount rent charge, the plaintiff had been obliged to pay the same, by reason whereof he had not had the quiet enjoyment of the premises, nor held the same free from incumbrances, nor had the defendants good title at the time of the demise. On the trial it appeared that the demise was by parol, and a verdict was entered for the plaintiff, with leave to set it aside if the court should be of opinion that a covenant for quiet enjoyment could not be implied by law from a parol demise, and the court *in banc*

tion to sustain such a promise, as a warranty of a chattel made after its sale cannot be enforced, unless some new consideration arise at the time of giving the warranty. Roscorla *v.* Thomas, 3 Q. B. 234 ; Hogins *v.* Plympton, 11 Pick. (Mass.) 97; Williams *v.* Hathaway, 19 id. 387; Bloss *v.* Kittridge, 5 Verm. 28.

Granger *v.* Collins was cited and approved in the late case of Maeder *v.* City of Carondelet, 26 Mo. 115 ; but there was there an express stipulation in the lease that nothing therein contained should be construed to imply a covenant for quiet enjoyment.

In a subsequent case in the Common Pleas, Messent *v.* Reynolds, 3 C. B. 194, there was a written *agreement to let*, followed by possession taken under it, and the tenant having been evicted by the reversioner sued in assumpsit on a promise that in consideration of the agreement and its performance by the plaintiff the latter might quietly use, occupy, possess, and enjoy the premises for the term. On a case stated, judgment was entered for the defendant, principally, it would seem, on the ground that the agreement was not an absolute one, as it contained a reference to certain "conditions mentioned in a memorandum" which were not set forth in the declaration, though it was thought to be at least doubtful whether, apart from this, a contract for quiet enjoyment would be implied from a mere *agreement* to let. "We are asked to imply," said Tindal, C. J., "from the agreement set out in the case, a covenant on the part of the defendant that the plaintiff should and might quietly use, occupy, possess, and enjoy the premises for the term for which the defendant had agreed to let them. It may be that a covenant for quiet enjoyment may be implied from a mutual agreement to let and take. But passing that by, it ought at all events to appear that there is an absolute agreement to demise for a term ; whereas, if this agreement be looked at, it will be seen that the defendant does not agree to demise to the plaintiff absolutely for eight years and a quarter, but 'subject to the same conditions as are mentioned in the memorandum to him from Mr. Flight.' How are we to say that the conditions to which reference is thus made do not apply to the term, and that it might not be legally determined, or that it was not avoided by some breach of the conditions ? The inference, therefore, which the plaintiff seeks to draw in his declaration is one that is not supported by law." And Cresswell, J., added, "There is no evidence of an express contract for quiet enjoyment ; but it is said that the law will imply it from the agreement set out. . . . Even assuming that the word 'let' in an agreement is equivalent to 'demise' in a lease under seal (which I am not prepared to admit), that would only raise an implied covenant coextensive, according to Adams *v.* Gibney [*infra*, p. 444, n. 1], only with the estate out of which the lease is granted."

were all of opinion that there was not a covenant for good title, but only for quiet enjoyment during the term; the plaintiff had therefore misdescribed the covenant arising out of the relation of the parties.[1]

So in a case in New York, where premises were occupied under a written agreement to let, not under seal, without any express covenant or the words *grant* or *demise*, it was held that no covenant for *title* could be implied, as it was said that "it never was held that a *mere* sale or lease imported a warranty of title in the grantor or lessor of real estate, as in the case of personal property."[2]

So in a recent case in New Jersey, where the defendant, having contracted to purchase certain premises, rented them by parol to the plaintiff, who went into possession with notice of the defendant's title. The contract of sale was subsequently rescinded, and the plaintiff, being evicted by the owner, brought this action "to recover damages for the breach of an oral lease," but upon the trial he was nonsuited, on the ground that the defendant had not from the mere fact of leasing agreed to warrant the title, and this was affirmed by the court *in banc*.[3]

[1] Leave was, however, granted, on payment of costs, to have a new trial, but it afterwards appearing that the only point reserved having been whether a covenant for quiet enjoyment could be implied by law from a parol demise, the court discharged the rule for a new trial and entered judgment upon the verdict.

[2] Baxter *v.* Ryerss, 13 Barb. (N. Y.) 284. That is to say, a warranty of the title, as distinguished from a covenant for quiet enjoyment; for the New York cases, as do all others, distinctly hold that the latter covenant is implied from the relation of landlord and tenant. See *supra*, p. 440. Unless this be borne in mind, the student may suppose that a contradiction exists which the cases do not warrant.

[3] Gano *v.* Vanderveer, 34 N. J. L. 293. "The theory of the action," said the court, "was, in matter of substance, erroneous. The ground of injury to the plaintiff consisted in the failure of the title of his lessor. If such title had been good, it is the plaintiff's contention he could have successfully defended himself and retained the possession of the premises. As the lessor did not have the title, the notion seems to be that an action will arise out of that circumstance. But this is not so. A man does not when he conveys or leases land covenant or agree, *ipso facto*, that the title is good. In the civil law, from an adequate price a warranty was implied; but it was to the contrary of this in the common law. Frost *v.* Raymond, 2 Caines, 188; Phillips *v.* Mayor, &c., 2 Vroom, (N. J.) 143. In Granger *v.* Collins, 6 Mees. & Welsb. 458, the Court of Exchequer held that no implied agreement for quiet enjoyment would arise from the mere relation of landlord and tenant. The books are full of cases touching the question from what words employed in the creation of a term of years a covenant or agreement to warrant the title will be implied. Thus at an early date, in Holder *v.* Taylor, Hob. 12, it was decided that the word *demisi* imports a covenant that the lessor had power to lease. So the word *concessi* has equal efficiency. Style *v.* Hearing, Cro. Jac. 73; 1 Saund. 322, n. It has been doubted whether the words 'let and lease' have any such effect by implication. Now it is evident the reports are full of cases of this sort, and yet they are all ob-

§ 275. The covenants for title implied from the words of leasing differed from the warranty implied from the word of feoffment, *dedi*, both as to source and effect. The former arose from contract, the latter from tenure. The warranty was a real covenant in its strict sense, and the warrantee recovered another feud in the place of that which was lost; while on the former the tenant recovered damages as a recompense for the term lost, and not another term in its place.

The warranty implied from the word *dedi* was, moreover, as we have seen, unrestrained by any express warranty which the deed might contain,[1] while the covenants implied from the words of leasing fell within the maxim *expressum facit cessari tacitum*, and were modified or restrained by express covenants. Thus in Nokes' case,[2] the lessor, after employing the words *demise* and *grant*, added a covenant for quiet enjoyment "without eviction by the lessor *or any claiming under him*," and it was held that "the said express covenant qualified the generality of the covenant in law, and restrained it by the mutual consent of both parties that it should not extend further than the express covenant," and this is settled law at the present day.[3]

Nor, it would seem, will the covenant implied in the creation of a leasehold endure longer than during the continuance of the estate out of which it is granted. Thus in an old case,[4] a tenant

viously idle and nugatory if, by force of the mere creation of a term of years, an agreement to warrant the title will arise. In the present case, the proofs go simply to the effect that the plaintiff became tenant to the defendant of these premises for one year; from this relationship no contract with respect to the title can be implied; consequently, on this ground, the plaintiff was rightly nonsuited." The court also held the lease to be void under the statute of frauds, though whether the plaintiff's possession was under a lease or an agreement to lease was not decided.

[1] *Supra*, p. 436.

[2] 4 Rep. 81.

[3] Frontin *v.* Small, 2 Raym. 1419; Merrill *v.* Frame, 4 Taunt. 329; Schlencker *v.* Moxsy, 3 Barn. & Cress. 789; Line *v.* Stephenson, 5 Bing. N. C. 183; Leonard *v.* Taylor, 7 Irish Law, 207; s. c. 8 id. 300; Kean *v.* Strong, 9 Irish L. (Q. B.) 74; Mostyn *v.* West Mostyn Co., L. R. 1 C. P. Div. 145; Tooker *v.* Grotenkemper, 1 Cin. S. C. (Oh.) 88. In other words, when a lessor means to limit his liability by binding himself to protect the tenant only against disturbances or defects of title arising from the lessor's own acts and the acts of those who represent or claim under him, and employs a special covenant for this purpose, the law will not render it useless and defeat his intention by overriding it with the more enlarged general covenants which the law otherwise implies from the very words of leasing. Deering *v.* Farrington, 1 Mod. 113; s. c. 1 Freem. 368; 3 Keb. 304; Dennett *v.* Atherton, L. R. 7 Q. B. 316; Merritt *v.* Closson, 36 Verm. 172; Tooker *v.* Grotenkemper, *supra*.

[4] Swan *v.* Searles, Dyer, 257 *a*; s. c. Benl. & Dal. 150. Though one of the four justices dissented, even he admitted that

for life having made a lease by the word *demisi*, the lessee was, after the death of the tenant for life and before the effluxion of the term, evicted by the remainderman and brought covenant against the executors of the lessor, but it was held that "the covenant in law ends and determines with the estate and interest of the lessor;" and in 1830 a decision was made in the Common Pleas to the same effect,[1] and the law has been held the same way on this side of the Atlantic.[2] The implied covenant is therefore obviously more restricted in this respect than an express covenant for quiet enjoyment.[3]

§ 276. The warranty and condition of re-entry arising at common law from an *exchange* of lands — implied at first from the exchange itself, and later from the use of the word *excambium*, and no other word[4] — remained unaltered in England until within our own day,[5] save, it is supposed, as to the remedy

had the lease been by deed-poll, and not indenture, he should have agreed with the majority, but the reporter questions this distinction. The doctrine of Swan *v.* Searles is also found in Hyde *v.* The Canons of Windsor, Cro. Eliz. 553, Cheiny *v.* Langley, 1 Leon. 179, and Bragg *v.* Wiseman, 1 Brownl. 23. In the last case covenant was brought against the executor of the husband upon a lease by husband and wife, and it was laid down "that a covenant in law shall not be extended to make one do more than he can, which was to warrant it as long as he lived and no longer."

[1] Adams *v.* Gibney, 6 Bing. 656. Tindal, C. J., stated that the facts exactly corresponded with those of Swan *v.* Searles (cited in last note), and after reviewing that and the other authorities said: "Unless, therefore, some very strong and insuperable objection had been raised to the principle of those decisions, which has not been done in the present case, we think it safer to adhere to them, the doctrine of which has been adopted in books of high authority; amongst others see Shep. Touch. 160, and Com. Dig. Covenant, C. And no injustice can be occasioned to the lessee by this decision, who must have known from the form of the reservation in the lease that his lessor was no more than a tenant for life, but was contented to accept a lease without an express covenant for quiet enjoyment."

[2] McClowry *v.* Croghan, 1 Grant, (Pa.) 311; Mayor of Brookhaven *v.* Baggatt, 61 Miss. 383.

[3] The distinction between an express and an implied covenant was laid down with great clearness in Williams *v.* Burrell, 1 C. B. 402, and the opinion of the court, by Tindal, C. J., was quoted at some length in the fourth edition of this treatise, p. 470.

[4] *Supra*, p. 433.

[5] The warranty in case of exchange was peculiar. "It is a special warranty, for upon the voucher by force of it he shall not recover other land in value, but that only which was given by him in exchange, for inasmuch as the mutual consideration is the cause of the warranty, it shall therefore extend only to land reciprocally given and not to other land, and this warranty runs only in privity, for none shall vouch by force of it but the parties to the exchange or their heirs and no assignee." Bustard's case, 4 Rep. 121. But although an assignee could not re-enter nor vouch, but only use the warranty to rebut, yet the exchangee might re-enter upon an alienee. Noy's Maxims, 61; Dean *v.* Shelly, 57 Pa. 427.

upon it.[1] The obvious practical objection to it was that it caused what was termed a "double title," since a purchaser of either property would of course have to examine the title of the other. A somewhat recent statute in England has altered the common law as to this, and deeds of exchange have there no longer the effect of creating any warranty, right of re-entry, or implied covenant.[2] In the United States, it is presumed that the common law exists,[3] unless where, in some of them, it is perhaps

[1] That is to say, it is not presumed that in later times the remedy was by voucher or *warrantia chartæ*, at least there is no such evidence; it must have been by action of covenant, and it has been doubted by some whether this warranty and re-entry were ever incident to exchanges effected by conveyances under the statute of Uses, but the better opinion seems to be that they were. See Stewart's note to 2 Black. Comm. 323.

[2] "In some instances, an abstract relating only to the property intended to be conveyed will not alone suffice, as where lands have been taken in exchange (4 Rep. 121, Prest. Abst. 87), or allotted under enclosure acts, in both of which instances an abstract must not only be furnished of documents of title relating to the estate sold or allotted, but of those also of the estates given in exchange, or of the original estates in respect of which the lands were allotted. The reason why a double title is required, in the first instance, is because the foundation of an exchange was an implied warranty, which engendered the right of entry in case of eviction. (Shep. Touch. 290; Finch L. 27; Shep. Prac. Couns. 2.) In the second instance, because the allotted lands became liable to the uses of the estates in respect of which they were allotted. The statute of 4 & 5 Will. IV. c. 30, §§ 24, 25, has, however, made some important alterations in the law in the latter case; as that statute, by expressly changing the uses, takes away any right of eviction after an exchange made of lands in common fields under the powers of that act; and by a still more recent enactment (8 & 9 Vict. c. 106), deeds of exchange have no longer the effect of creating any warranty or right of re-entry or implied covenant, by implication. But this statute is only prospective, and will not affect assurances made previously. As to these, therefore, a double abstract will still be necessary." 1 Hughes on Sales of Real Property, 246. See also 1 Preston on Abstracts of Title, 303, and the comments upon that passage in Allnatt on Partition, 172. In Barton's Conveyancing, it is said (p. 107), "As the word 'exchange' implies a mutual warranty, it would seem that the usual covenants for title, quiet enjoyment, and further assurance might be safely omitted in a deed of exchange at the common law, as those covenants, it is said, are implied by the word *exchange;* but express covenants are more extensive and better to be relied on than implied ones." Of course, under such covenants, the common law right of re-entry in case of eviction does not exist. Bartram *v.* Whichcote, 6 Simons, 92.

[3] Grimes *v.* Redmon, 14 B. Mon. (Ky.) 237; Pugh *v.* Mays, 60 Tex. 191. "Exchanges," said Sharswood, J., in Dean *v.* Shelly, 57 Pa. 427, "have fallen into disuse in modern conveyancing. To make an assurance of that character, it is indispensable that the word *excambium* — exchange — should be employed, which, as Lord Coke says, is so individually requisite as that it cannot be supplied by any other word, or described by any circumlocution. Co. Litt. 51 *b*." And hence, where one conveyance was simply partly in consideration of another, there was held to be no implied warranty or condition of re-entry. So in Walker *v.* Renfro, 26 Tex. 142, where, "although the transaction was in effect an exchange, it was not a technical exchange."

deemed to be obsolete, and where in others it has been altered by statute.[1]

§ 277. As to the warranty and condition of re-entry implied from *partition.*

This being by writ, of course the warranty was implied from the partition itself, and not from any particular words used.[2] It is familiar that the right to partition existed at common law solely between coparceners, and there was this difference between the warranty and the condition: when a parcener re-entered for condition broken, she defeated the partition in the whole; but when she vouched by force of the warranty, the partition was not defeated in the whole, but she recovered recompense for the part that was lost.[3]

But to joint tenants and tenants in common there was by the common law no right to partition by writ — between them it must be voluntary merely. And hence was passed the well-known statute of 31 Hen. VIII. c. 1, which gave to all joint tenants and tenants in common the right to make partition between them by writ, "in like manner and form as coparceners by the common laws of this realm have been and are compellable to do," with the proviso "that every of the said joint tenants or tenants in common and their heirs, after such partition made, shall and may have aid of the other or of their heirs, to the intent to deraign the warranty paramount and to recover for the rate, as is used between coparceners after partition made by the order of the common law."

It will be perceived that this statute gave the right to the *warranty* only, and as between joint tenants and tenants in common the *condition* neither existed nor exists by common law or by statute.

The common law, therefore, in cases of partition by writ, gave to coparceners a warranty and a condition, and the statute gave to joint tenants and tenants in common warranty alone. But the

[1] As for example under the New York Revised Statutes, *supra*, p. 438, n. 3.

[2] The partition of course took effect from the judgment of the court — after the judgment *quod partitio fiat*, the issue of the *breve de partitione faeienda*, and the sheriff's return — that "the partition so made remain firm and stable forever," which judgment (unlike the decree in equity in cases of partition) of itself passed the title to the allotments in severalty.

[3] Bustard's case, 4 Rep. 121; Co. Litt. 174 *a*; Allnatt on Partition, 158; Miller on Partition, 245; Feather *v.* Strohoecker, 3 Pa. (old Pa., not Pa. St.) 503; Walker *v.* Hall, 15 Ohio, 361.

reason why warranty was implied in a partition between coparceners is not perhaps, very clearly stated in the books, and in view of a few decisions the subject would seem to bear some explanation.

Under the old warranty, the heir at common law, that is, the eldest son, was alone bound by and entitled to its benefit. So strict was this, that although the local customs of gavelkind and borough English were recognized as in the one case dividing the inheritance among all the sons, and in the other giving it to the youngest, yet the warranty *of* the ancestor, and the warranty *to* the ancestor, bound and profited only the eldest son, the heir at law.[1] But as to females—and for obvious feudal reasons—it was as much the common law that a feud should descend equally among the daughters as that among the sons it should go to the eldest alone, and all the sisters were heirs at common law, and, as such heirs, all were entitled to the benefit of the warranty which had come to them with the estate from their ancestor.[2] So long as they held together, if one were impleaded she might "call in aid" her sister to "deraign the warranty paramount," that is to say, to assist her in vouching the warrantor of their ancestor; and if the land were lost it was the loss of both, and if the recovery in value yielded other land from the warrantor it became in turn the land of both. But as one of the incidents of coparcenary was that each sister could, by writ, compel the other to make partition, the common law, with that wisdom which lay at the bottom of most of its teachings, would not suffer the sister thus compelled to be put in a worse position after than she had been before the partition, and therefore by an exception to the law of warranty it continued its benefit in severalty as it were, and in order that any future loss should be a loss to both, it annexed or implied a warranty in the partition; that is to say, it still retained to each the right to "call in aid" the other in order to "deraign the warranty paramount," and it gave to each the right, in case of loss not thus made up to them under that warranty, to recover in value from the other *pro rata* according to the extent of the loss, or, as it was termed, to "recover for the rate," and also to re-enter.[3] But if, after partition made, one sister aliened, she lost

[1] Brooke's Abr. tit. Garranties, pl. 11; Assiz, pl. 22; Litt. §§ 735, 736; Robinson on Gavelkind, 127.

[2] Litt. § 241.

[3] This is thus stated by Littleton: "Also, if a man bee seised in fee of a carve

the right of re-entry and of recovery for the rate, "because by the alienation she had dismissed herself to have any part of the tenements as parcener,"[1] but not, it would seem, the right to deraign the warranty paramount.[2]

And if the parceners, instead of making partition by writ as by law they were compellable to do, chose voluntarily to make partition by deed, as of course joint tenants and tenants in common could always do, the estate in coparcenary was of course at an end, and as each of them had thus, as in the case of alienation, "altogether dismissed herself to have any part of the tenements as parcener," the warranty was gone.[3]

Then when the statute of Henry the Eighth gave to joint tenants and tenants in common (who before could only partition by deed) the right to have partition by writ "in like manner and form as coparceners," to make the analogy perfect, it provided that after partition each of them and their heirs (but not assigns) should have aid of the other to deraign the warranty

of land by just title, and hee disseise an infant within age of another carve, and hath issue two daughters, and dyeth seised of both carves, the infant being then within age, and the daughters enter and make partition so as the one carve is allotted for the part of the one as *per case* to the youngest in allowance of the other carve which is allotted to the purpartie of the other, if afterward the infant enter into the carve whereof he was disseised upon the possession of the parcener which hath the same carve, then the same parcener may enter into the other carve which her sister hath and hold in parcenary with her." Litt. § 262. This is also the explanation of Coke's sentence: "If there be two coparceners of certain lands with warranty, and they make partition of the land, the warranty shall remain, because they are compellable to make partition." Co. Litt. 365 *b*. That is to say, the exercise of the right to have partition shall not destroy the beneficial incidents of the estate as they existed before the partition.

[1] Thus Littleton goes on to say: "But if the youngest alien the same carve to another in fee before the entry of the infant, and after the infant enter upon the possession of the alienee, then she cannot enter into the other carve; because by her alienation she hath altogether dismissed herself to have any part of the tenements as parcener. But if the youngest before the entry of the infant make a lease of this for terme of yeares, or for terme of life, or in fee tayle saving the reversion to her, and after the infant enter, there peradventure otherwise it is; because she hath not dismissed herselfe of all which was in her, but hath reserved to her the reversion and the fee," etc. Litt. § 262.

[2] Coke says, in commenting upon this passage: "Hereupon it followeth, that if one parcener maketh a feoffment in fee, and after her feoffee is impleaded and voucheth the feoffor, she may have aid of her coparcener to deraigne a warranty paramount, but never to recover *pro rata* against her by force of the warranty in law upon the partition; for Littleton here saith that by her alienation she hath dismissed herselfe to have any part of the land as parcener, and without question as parcener she must recover *pro rata*, upon the warranty in law, against the other parcener." Co. Litt. 174 *a*.

[3] Morrice's case, 6 Rep. 12 *b*, *infra*, p. 449.

paramount and to recover for the rate "as is used between coparceners after partition made by the order of the common law;" and, still to keep up the analogy, it was held, after this statute had been in force for more than a century, that if joint tenants, who thus equally with coparceners were compellable to make partition, chose voluntarily to make partition by deed, the warranty was gone;[1] their right to deraign the warranty paramount and to recover for the rate was their right by statute as an incident to the remedy it afforded; they had not pursued that remedy, and they could not therefore have that right. Nothing could be more logically consistent than the whole of this system.

§ 278. This statement of the common law and its statutory alteration has been thus sketched because in some of our States that law, brought to this country by our ancestors, is practically in force at the present day. And several decisions have correctly held that in the case of partition by deed between joint tenants, and also as between tenants in common, their right to recompense in case of loss depends solely on the covenants contained in the deed, and not upon any implied warranty.[2] But as to coparceners, the law seems not to have been so carefully considered. In a case in Maryland, it was held that in partition by deed between coparceners the warranty implied by law was superseded by the express covenants in the deed,[3] and in Pennsylvania it has been held that tenants in common *by descent*, having been by the statutes of descent put upon the same footing as coparceners, should have all the benefit which coparceners at common law had in cases of partition by deed;[4] and it was hence decided that in a partition by deed between tenants in common by descent, there

[1] Morrice's case, 6 Rep. 12 *b*. "Between Smith and Morrice the case was such: two joint tenants are with warranty, and partition was made between them by judgment in a writ of *partitione facienda*, by force of the statute of 31 Hen. VIII. c. 1. And it was adjudged that the warranty remained, because by the king's writ they are compellable by the statute (to which every one is party) to make partition, and the party has pursued his remedy according to the act, and therefore none can have wrong by the operation of the statute, to which every one is party; but if they had made partition by deed by consent, after the said act, although they were compellable by writ to make partition, yet forasmuch as they had not pursued the statute to make partition by writ, therefore such partition doth remain at the common law, and by consequence the warranty is gone."

[2] Weiser *v.* Weiser, 5 Watts, (Pa.) 279, where is a learned opinion by Kennedy, J.; Rector *v.* Waugh, 17 Mo. 26; Picot *v.* Page, 26 id. 420; Smith *v.* Sweringen, id. 567; Cashion *v.* Faina, 47 id. 133; Rountree *v.* Denson, 59 Wis. 522.

[3] Morris *v.* Harris, 9 Gill, (Md.) 26.

[4] Which was none at all, if the law has been correctly stated in the text.

was an implied warranty of title between them, so that in an action of ejectment brought by one of them to recover the possession of part of the land allotted to him by the deed, the other tenant in common was not a competent witness for the plaintiff.[1] But in both of these cases the law was, it would seem, incorrectly assumed to be that in partition by deed between coparceners there was an implied warranty.[2]

§ 279. As respects the practical effect at the present day of the warranty implied from partition, it was recently held in Tennessee, where the subject was elaborately examined in the case of a bill for contribution and reimbursement by one tenant in common against his co-tenant and the alienees of the latter, that a bill in equity was the proper and most convenient remedy,[3] and the same view has been taken in a somewhat recent case in Ohio, in which the operation by estoppel of an implied warranty between coparceners was denied;[4] and in one of the Pennsylvania cases just referred to,[5] it was considered to be at least doubtful whether a personal action of covenant could be maintained for a breach of the implied warranty. No other remedy was, however, suggested, and as we have seen that there was as between tenants in common no condition of re-entry, the warranty would seem to be practically useless.

§ 280. Owing to a misapprehension of one or two old cases, the dangerous doctrine has been more than once broached that

[1] Patterson *v.* Lanning, 10 Watts, (Pa.) 135.

[2] Kennedy, J., cited in his opinion: "If there be two coparceners of certain lands with warranty, and they make partition of the lands, the warranty shall remain, because they were compellable from the first to make partition. Co. Litt. 165 *a*. The law, however, is different as to joint tenants, who, at the common law, were not compellable to make partition; and hence, if they hold their lands under warranty, and make partition thereof without writ, the warranty will be destroyed. Co. Litt. 187 *a*." Here, however, Coke is speaking of the warranty of the ancestor of the coparceners — the warranty paramount — and not of any warranty implied by the partition, and the partition referred to in the first sentence is evidently partition by writ and not by deed. Patterson *v.* Lanning, however, would seem to have been considered in Pennsylvania as correctly expressing the law, though the grounds of the decision have never been seriously considered. See Strohoecker *v.* Housel, 5 Pa. Law Jour. 327; Seaton *v.* Barry, 4 Watts & Serg. 184; Allen *v.* Gault, 27 Pa. 475. The law would seem to have been more correctly stated in Walker *v.* Hall, 15 Ohio, 355, *infra*.

[3] Sawyers *v.* Cator, 8 Humph. (Tenn.) 256, 287.

[4] Walker *v.* Hall, 15 Ohio, 355. The opinion in this case, as also that in Sawyers *v.* Cator, *supra*, were quoted at some length in the fourth edition of this treatise, p. 478.

[5] Patterson *v.* Lanning, *supra*.

covenants for title may be implied from a recital, but this has since been distinctly and decisively repudiated.[1]

§ 281. For several hundred years after the statutes *de bigamis* and *quia emptores*, no act of Parliament, save that of 11 Hen. VII. c. 20,[2] which affected only warranties by a feme covert or widow without the consent of those entitled in remainder after her husband's death, interfered to enlarge or to restrain such warranties or covenants as were implied at common law, and, as we have seen, the word *dedi* was the only one from which, in the conveyance of a freehold, a warranty could be implied.[3] During the interval which elapsed before Parliament again legislated upon the

[1] In the early case of Severn *v.* Clerk, 2 Leon. 122, in an action of debt on a bond conditioned to perform certain articles contained in a deed, whereby the obligor had assigned a term of years, reciting that he was possessed of them, it was held that if the party had not that interest by a good and lawful conveyance, his obligation was forfeited. It was said that the recital of itself was nothing, but being joined and considered with the rest of the deed, it was material. It has, however, been chiefly owing to the misapprehension (in Browning *v.* Wright, 2 Bos. & Pull. 13) of the case of Johnson *v.* Procter (4 Yelv. 175; 1 Bulst. 3, in which the report is more full) that such an opinion has been entertained as to the effect of a recital. In that case, A. and B. being joint tenants for years of a mill, A. assigned all his interest to C, without the assent of B., and died. B. afterwards, by indenture reciting the lease and that it came to him by survivorship, granted the residue of the term to J. S., and covenanted for quiet enjoyment, notwithstanding any act done by him. He also gave the purchaser a bond conditioned to perform the covenants, grants, articles, and agreements in the assignment; and the purchaser, having been evicted by C. of the moiety assigned to him, brought an action on the bond, and judgment was given in his favor. Lord Eldon considered the judgment as having turned on the recital, and that the recital itself amounted to a warranty. But the decision seems to have turned upon the word *grant*, and not at all upon the recital, and Sugden, in noticing the case (2 Sugd. on Vend. 524), says: "It seems material to refer the case of Johnson *v.* Procter to the true ground of the decision, because, if the case turned solely on the recital, it might perhaps be thought that a general recital in a conveyance of the inheritance of an estate that the vendor is seised in fee, would amount to a general warranty, and would not be controlled by limited covenants for the title, — a proposition which certainly cannot be supported." And this view was sustained in the recent case in Ireland of Delmer *v.* McCabe, 14 Irish Com. L. 377, in which the authority of Johnson *v.* Procter was distinctly denied. Huston, J., took up the same misapprehension in Christine *v.* Whitehill, 16 Serg. & Rawle, (Pa.) 112, where it was held that a recital "being part of fifty-eight acres which A. B. granted," amounted to a covenant for seisin, a decision from which Gibson, C. J., strongly dissented at the time, and which, when the same case came up again (Whitehill *v.* Gotwalt, 3 Pa. (old Pa., not Pa. St.) 327) some years after, was overruled in a very accurate and lucid opinion. In a case in Missouri (Ferguson *v.* Dent, 8 Mo. 673), it was correctly said that "a grantor, and in some instances even strangers may be estopped by mere recitals in a deed (as to which see *supra*, Ch. XI.), and yet it does not follow that such recitals are covenants, either express or implied."

[2] *Supra*, p. 11.

[3] *Supra*, p. 5. The word "conveyance" is here used in its popular sense, and does not include an exchange or partition.

subject, the ancient system of law had given place to the modern; feoffments had been superseded by conveyances taking effect under the statute of Uses, and warranties, by covenants for title. It is familiar learning that the passage of the statute of Uses led to the introduction of deeds of bargain and sale, and that after the statute of Enrolments had required that the latter should be registered, there was introduced the mode of assurance by lease and release.[1]

§ 282. Deeds of bargain and sale were still, however, used in some parts of England, and in the year 1707 was passed the very local statute of 6 Anne, c. 35, which provided for the public registering of deeds, in certain parts of the county of York, by the 30th section of which it was enacted that "In all deeds of bargain and sale hereafter enrolled in pursuance of this act, whereby any estate of inheritance in fee simple is limited to the bargainee and his heirs, the words *grant*, *bargain*, *and sell* shall amount to, and be construed and adjudged in all courts of judicature, to be express covenants to the bargainee, his heirs and assigns, from the bargainor for himself, his heirs, executors, and administrators, that the bargainor, notwithstanding any act done by him, was at the time of the execution of such deed seised of the hereditaments and premises thereby granted, bargained, and sold, of an indefeasible estate in fee simple, free from all incumbrances (rent and services due to the lord of the fee only excepted), and for quiet enjoyment thereof against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance thereof to be made by the bargainor, his heirs and assigns, and all claiming under him; unless the same shall be restrained and limited by express particular words contained in such deed; and that the bargainee, his heirs, executors, administrators, and assigns respectively, shall and may, in any action to be brought, assign a breach or breaches thereupon, as they might do in case such covenants were expressly inserted in such bargain and sale."

Owing to the very local application of this statute, as also to the clearness of the language of this section, there is not only an absence of its judicial interpretation, but it has passed almost unnoticed by legal writers.[2]

[1] See Reeves, History of the Common Law, ch. xxx.; 2 Black. Comm. 338 *et seq.*

[2] It has been given here at length because, as will be seen, it has been re-enacted

§ 283. The next enactment as to statutory implied covenants for title had a wider range. In 1845, was passed the act of 8 & 9 Vict. c. 119,[1] one of a series called "The Real Property Acts," whose purpose was not only to curtail luxuriant verbosity, but to introduce short forms, sometimes called "pattern covenants," to supersede those then in use.[2] But as to this at least, the act was a failure, the short forms (whose use was not obligatory) were seldom or never used, and before long, the act was said to be "consigned to a deserved oblivion." [3]

more or less literally in many of the United States. It will be perceived that the covenants implied by this act are carefully limited to the acts of the grantor and those claiming under him. The words "notwithstanding any act done by him," are the proper restraining words of the covenants for seisin and against incumbrances; see *supra*, pp. 24, 28. Those for quiet enjoyment and for further assurance are also expressly limited in the usual manner; *supra*, pp. 24, 26, 29. It is difficult to perceive how the covenants for title should be more limited, and yet to prevent the possibility of misconception as to a covenantor being bound even to this limited extent against his will, it is provided that even these covenants can be restrained and limited by express particular words in the deed.

[1] Sometimes known as Lord Brougham's Act.

[2] For example, a schedule contained a short form of deed, not unlike some ordinary deeds of bargain and sale in this country, the word of conveyance being simply "grant." Another schedule was divided into two columns, and the words used in the first were to have the same effect as if the words in the second had been inserted, thus:

Column I.	Column II.
1. The said (covenantor) covenants with the said (covenantee):	1. And the said covenantor doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with and to the said covenantee, his heirs and assigns, in manner following (that is to say):

And then followed forms for expressing the covenant for right to convey, for quiet enjoyment, against incumbrances, for further assurance, for the production of title deeds, and that the grantor had done no act to incumber. For a fuller reference to this statute see the fourth edition of this treatise, pp. 482, 483.

As will be seen presently, several of our States have partially followed the lead of this statute.

[3] Dart on Vendors (4th ed.), 463; and he adds, "Such enactments are either unnecessary or mischievous; unnecessary, if the parliamentary form would, if unauthorized by Parliament, merely express in fewer words the meaning of the forms in ordinary use; and mischievous, if an unnatural and secondary meaning is given by statute to words which are *prima facie* clear and intelligible; for the effect is to increase the difficulty of legal documents to the unprofessional reader." Sugden also, in his later abridgment of his work on Vendors, as well as in his last edition of the complete work, passed over the statute of 8 & 9 Vict. with the most casual notice. See also a severe criticism on this statute in 9 Jurist, part ii. 333, 334, and in a notice on the recent statute to be presently referred to, it is said (of the statute 8 & 9 Vict.): "It has remained so absolutely a dead letter, that many of our readers will now hear of its existence

§ 284. In 1881, was passed the act cited as "The Conveyancing and Law of Property Act, 1881,"[1] which, repealing the 8 & 9 Victoria, is more elaborate.[2] The time since its passage has been so short that, so far at least as the covenants for title are concerned, scarcely any reported cases appear to have been decided under it,[3] though it has been the subject of notice by recent text writers.[4]

for the first time, and in all probability not a single draft has ever been drawn in pursuance of its provisions." 17 Law Times, 335.

In Ontario, chap. 91 of the Con. Sts., taken from the English St. 8 & 9 Vict. c. 119, provides for a short covenant that the covenantor has the right to convey the land, notwithstanding any act done or suffered by him (Leith's Real Prop. Stats. 93, 103); and this latter clause is absolutely necessary to a covenant under the act. Brown *v.* O'Dwyer, 35 U. Can. Q. B. 354, where it was held that if the words "notwithstanding any act," etc., be omitted from a conveyance purporting to be made under this act, the covenant will not be within the statute, but will bind the covenantor according to its words; and that if the subsequent covenants for quiet possession, further assurance, and against incumbrances are in accordance with the statute, they will not be made absolute by the omission of those words from the covenant of right to convey.

[1] 44 & 45 Vict. c. 41, L. R. xvii. Stat. 110, sometimes known as Lord Cairns's Act, entitled "An Act for simplifying and improving the practice of conveyancing, and for vesting in trustees, mortgagees, and others various powers commonly conferred by provisions inserted in settlements, mortgages, wills, and other instruments, and for amending in various particulars the laws of property, and for other purposes," approved 22 August, 1881. As the statute is nearly forty pages long, and the "Law Reports" are to be found in every considerable library, a brief notice of it here must suffice.

[2] Section 7 refers to the covenants for title, and commences: —

"(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject matter or share of subject matter expressed to be conveyed by him with the person, if one to whom the conveyance is made, or with the persons jointly, if more than one to whom the conveyance is made as joint tenants, or with each of the persons, if more than one to whom the conveyance is made as tenants in common, that is to say: (A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):" And then follow the covenants (for right to convey, quiet enjoyment, freedom from incumbrance, and further assurance) to be implied. The several kinds of assurance for which covenants are thus provided are conveyance of freehold and leasehold for value by beneficial owner, mortgage of the same by the same, deed of settlement, and conveyance by trustees, executors, committees of lunatics, etc., and then follows the proviso: "A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied."

[3] *In re* Johnson & Tustin, L. R. 30 Ch. Div. 42, Fry, L. J., referred to the act as having been "framed in favor of the vendors."

[4] Hood & Challis's Conveyancing Acts, 1881–82 (London, 1884); Greenwood's Real Property Statutes (1884); T. C. Williams's Conveyancing Statutes (1884);

§ 285. But although statutory implied covenants for title have but recently come into general use in England, yet such enactments, for the most part copied from the statute of Anne, have been passed in many of our States, and are in full force.

The first of them was in Pennsylvania. Within eight years after the statute of Anne, and in its early colonial days, "An Act for acknowledging and recording of deeds" [1] was there passed, the sixth section of which was copied from the English statute, though the attempt at brevity caused it to be less clear. It declared that [2] "All deeds to be recorded in pursuance of this act, whereby any estate of inheritance in fee simple shall hereafter be

Goodeve's Modern Law of Real Property, 2d ed. The student will find a series of articles on this statute, commencing immediately after its passage, in 71 Law Times, pp. 334, 401; 72 id., pp. 167, 186, 204, 220, 257, 346, 365, 382, 434; 73 id., pp. 5, 78, 96, 117, 137, 157. In one of these articles it is said (72 Law Times, 166), "With regard to covenants (sect. 7), it should be carefully noticed that this act will not imply covenants unless the phraseology required by the act is used. The party must not only convey as beneficial owner, etc., but he must be expressed to convey as such. In drawing an ordinary conveyance on sale of freeholds, from one person to another person, there is no reason why the purchaser should not use the short expressions required by the statute, and the covenants for title can be safely omitted. . . . It is a different question whether the vendor should accept them (the covenants). They slightly enlarge his liability by precluding all question as to what covenants run with the land, and as to his direct liability to all persons in whom the estate or interest of the implied covenantee is, for the whole or any part thereof, from time to time vested."

The general result of this statute is thus summed up in the Report on Land Transfer, issued by the Bar Committee in March, 1886: —

"The objects proposed both by 8 & 9 Vict. c. 119, and by Lord Cranworth's Act, have been completely attained by certain parts of the Conveyancing and Law of Property Act, 1881. With regard to the following points, that act's provisions, though not compulsory, have been completely adopted into the current practice.

"1. Covenants for title, in conveyances on sales, mortgages, settlements, reconveyances by mortgagees, and conveyances by trustees, are contained within the compass of three or four words.

"2. 'General words' are inserted only under special circumstances, and then only in an exceedingly condensed form.

"3. The 'all the estate' clause, as an adjunct to specified parcels, is invariably omitted.

"4. Covenants for the production and safe custody of deeds have been superseded by short forms, styled 'acknowledgments' and 'undertakings.'

"5. Express powers of sale, and trusts or directions as to sale moneys, and similar provisions, are no longer inserted in mortgages.

"6. Express powers of sale, vested in trustees, require no specific mention of their mode of exercise.

"7. Powers for the management of infants' property, maintenance, and education are no longer inserted in settlements, unless under very special circumstances.

"8. Express provisions relating to the appointment of new trustees of settlements are either wholly omitted, or are restricted to naming the persons by whom the statutory powers are to be exercised."

[1] Act of 28th of May, 1715.

[2] The word "In" at the beginning of this section was of course accidentally omitted in transcribing.

limited to the grantee and his heirs, the words *grant*, *bargain*, *sell*, shall be adjudged an express covenant to the grantee, his heirs and assigns, to wit, that the grantee was seised of an indefeasible estate in fee simple, freed from incumbrances done or suffered from the grantor (excepting the rents and services due to the lord of the fee), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed, and that the grantee, his heirs, executors, administrators, and assigns, may in any action assign breaches, as if such covenants were expressly inserted."[1]

Apart from mere verbal alterations, there are two points of difference between the English and the Pennsylvania statute: the covenant for seisin in the latter not being introduced by restrictive words, and the former implying a covenant for further assurance, which the latter omits. Why this useful covenant was omitted can now be only conjectured. It might at first be supposed to be owing to the absence of a court of chancery in Pennsylvania, since a remedy upon this covenant is usually sought in equity, but when we find that on the same day on which the act was passed there was also passed one of the acts for erecting a supreme or provincial court of law and equity,[2] this reason would seem to fail.

No doubt could have arisen that all the covenants implied under the statute of Anne were limited to the acts of the grantor and those claiming under him, and did not extend to defects of title anterior to the conveyance to him. But the Pennsylvania act made the first covenant, that for seisin, an unlimited one, while the subsequent covenants are restrained to the acts of the grantor. The question would hence arise whether the latter covenants re-

[1] The following proviso is at the end of this section: "Provided always, that this act shall not extend to leases at rack-rent, or to leases not exceeding one and twenty years, where the actual possession goes with the lease." This proviso has no particular connection with this section; if it had, it would be insensible, as the section is limited in application to deeds "whereby any estate of inheritance in fee simple" is conveyed, and the proviso would, according to this construction, exempt leases at rack-rent, etc., to which the section never was intended to extend. The proviso is, therefore, awkwardly introduced. It really refers, however, to the prior recording provisions of the act, as appears from looking at the 29th section of the statute of Anne, from which the clause is copied. It is remarkable that in many States in which this section of the Pennsylvania statute has been re-enacted the proviso has been retained.

[2] And there had been several such acts before. Rawle on Equity in Pennsylvania, p. 11.

strained the former. Were it to arise upon express covenants in a deed, there might be little difficulty in holding, under the authority of a class of cases to be presently referred to,[1] that the covenant for seisin stood by itself, an unlimited covenant, and unqualified by those which followed it. But where the question is upon the construction of a statute, which turns certain words of grant into express covenants, there is every reason why a limited interpretation should be given to those covenants which every man is, as it were, obliged to enter into when the words of implication are, as in Pennsylvania, the words generally employed in conveyancing.[2]

The case of Bender *v.* Fromberger has been already referred to.[3] It was there mentioned that it had been the general understanding of the profession that the words "grant, bargain, and sell" imported a general warranty, and it was hence held that this general warranty could not be restrained by a subsequent special warranty; and this, as a general proposition, was unquestionably correct. But in the subsequent case of Gratz *v.* Ewalt[4] the construction of the statute was carefully considered, and it was held that the first covenant, which standing by itself would be unlimited, must be taken in connection with the subsequent one against incumbrances which is limited, and consequently that none of the covenants

[1] See *infra*, p. 458.

[2] In the first place the covenants are, in one sense, implied, and the danger arising from such covenants has been often referred to by courts in strong terms. In the second place, there is a different technical rule of construction called in to the interpretation of such a statute; and while, with respect to deeds, the rule is that the words are to be taken most strongly against the party using them, in the construction of statutes the rule is equally familiar, that statutes in derogation of the common law are to be construed strictly. Now the common law gave no effect of warranty to the words "grant, bargain, and sell," and it may not unreasonably be said that a statute altering the common law in this respect should, when it is doubtfully expressed, be so construed as to give to the warranty the most limited extent. And since these remarks were written, the same view has been expressed from the bench, in Illinois, in the case of Finley *v.* Steele, 23 Ill. 59.

The writer has heard a doubt suggested from the bench whether the statute could be held to apply to the case of a conveyance made in execution of a power, on the ground that such vendors might not be grantors within the meaning of the statute; and in Shontz *v.* Brown, 27 Pa. 134, it was expressly decided that the words "grant, bargain, and sell," when used by executors in a deed conveying the real estate of a decedent, "imply no personal undertaking, for they are used in the necessary execution of their trust, and are limited by the occasion." See the ensuing chapter, and see and consider the remarks of Mr. Butler in Co. Litt. 384 *a*, upon the subject of the unsoundness of the objection sometimes made by trustees to conveying by the word "grant."

[3] 4 Dall. (Pa.) 436; *supra*, § 158.

[4] 2 Binn. 98.

implied by the statute were to be construed as extending beyond the acts of the covenantor;[1] and the construction thus given has never been departed from in Pennsylvania;[2] and it is said by

[1] "The meaning," said Tilghman, C. J., who delivered the opinion, "is not clearly expressed; but I take it to be a covenant . . . that the estate was indefeasible as to any act of the grantor. For if it was intended that the covenant should be that the grantor was seised of an estate absolutely indefeasible, it was improper to add the subsequent words, 'freed from incumbrance done or suffered by him.' . . . The words 'seised of an indefeasible estate in fee simple' are to be considered, therefore, as not standing alone, but in connection with the words next following, 'freed from incumbrances done or suffered from the grantor.' I am the more convinced that this was the intention of the legislature, by comparing the expressions in this act with the 30th section of the statute of 6th Anne, c. 35, which contains a provision on the same subject, and was evidently in the eye of the persons who framed our law. The British statute makes use of more words, and the intention is more clearly expressed. It declares that the words *grant, bargain, and sell* shall amount to a covenant that the bargainor, *notwithstanding any act done by him*, was, at the time of the execution of the deed, seised of an indefeasible estate in fee simple, etc. Our law seems intended to express the substance of the British statute in fewer words, and has fallen into a degree of obscurity which is often the consequence of attempting brevity. I can conceive no good reason why our legislature should have wished to carry this implied warranty further than the British statute did, because it has bad effects to annex to words an arbitrary meaning far more extensive than their usual import, and which must be unknown to all but professional men. It might be very well to guard against secret acts of the grantor, with which none but himself and those interested in keeping the secret could be acquainted. As for any further warranty, if it was intended by the parties, it was best to leave them to the usual manner of expressing it in plain terms." Had the case of Bender *v.* Fromberger, *supra*, been presented after this determination, its decision would have been different, in case the deed had not contained express general covenants for seisin and of right to convey, as it was taken for granted in that case that the statutory covenants were general. See *supra*.

[2] Funk *v.* Voneida, 11 Serg. & Rawle, 111 (see Knepper *v.* Kurtz, 58 Pa. 484, for the correction of an apparent *dictum* in this case, as to which see also Winston *v.* Vaughan, 22 Ark. 74); Whitehill *v.* Gotwalt, 3 Pa. (old Pa., not Pa. St.) 323; Seitzinger *v.* Weaver, 1 Rawle, 377. In this last case, it was held that the statute applied not only to deeds executed, but to articles of agreement for the sale of real estate. "It is insisted," said Gibson, C. J., who delivered the opinion, "that the act of assembly, by force of which such a covenant can be implied, is applicable only to conveyances executed. No express provision to that effect is found in the act itself, and there certainly is nothing in the nature of an executory contract to call for such a construction. Where the vendee has done everything on his part to entitle him to the estate, the articles are an equitable conveyance of the title, and therefore fall within the letter as well as the spirit of the enacting clause. He sometimes obtains no other title, and for that reason alone the law ought to be construed liberally for his protection. Where a sound price has been paid for an unsound title, I see no objection on this ground to its being recovered back." The covenant against incumbrances was included here in the covenant for seisin, since the next sentence is, "But this special covenant of seisin is broken by the existence of an incumbrance created by the vendor the instant it is sealed and delivered."

Shaffer *v.* Greer, 87 Pa. 370, is not inharmonious with the above, as it merely explained that the word "suffered" included the case of a tax on the land, which

Chancellor Kent,[1] that "by the decision in Gratz *v.* Ewalt the words of the statute are divested of all dangerous tendency, and that it will equally apply to the same statutory language in other States."

§ 286. We are now to consider in what States there are similar provisions, and the construction which they have received. Such a subject is, however, approached with diffidence, as no author is competent to consider the effect of the local statutes of any State other than his own.

In none of the New England States does there appear to have been any such implied covenant created by statute.

None such ever existed in New York, and the Revised Statutes declare that no "covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not;"[2] but it is held in that State that this provision does not extend to leases.[3]

The words of enactment in the New York statutes have been copied in those of Michigan,[4] Minnesota,[5] Oregon,[6] Wisconsin,[7] and Wyoming.[8]

the covenantor had allowed to remain unpaid, though it created no personal liability.

[1] 4 Comm. 474.

[2] Sandford *v.* Travers, 7 Bosw. (N. Y.) 498.

[3] *Supra*, p. 438, n. 3.

[4] Rev. St. 1846 and 1857; Howell's Amend. St. 1882, § 5656.

[5] Rev. St. 1866; Gen. St. 1881, p. 535. The Minnesota statutes contain a proviso, which is also found in Massachusetts, that "whoever conveys real estate by deed or mortgage containing a covenant that it is free from all incumbrances, where an incumbrance appears of record to exist thereon, whether known or unknown to him, shall be liable in an action of contract to the grantee, his heirs, executors, administrators, successors, or assigns, for all damage sustained in removing the same." § 35. Fisher *v.* Parry, 68 Ind. 465, was a case of a deed made in Minnesota but sued upon in Indiana, and it was held that the *lex fori* prevailed. As to this, see *infra*, Ch. XIII.

[6] Acts of 1854, p. 476, § 6, Deady's Laws, p. 647, § 6. And in the laws of 1874 the same provision is found. Gen. Laws, p. 516, § 6.

A former statute had provided (Laws of Oregon, 1843–49, p. 139) that "the words grant, bargain, and sell, in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by express terms in such conveyances, be construed to be the following express covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns," that he is seised of an indefeasible estate, against incumbrances, and for further assurance; and in Fields *v.* Squires, 1 Deady, (C. C. U. S.) 366, 390, which arose upon the construction of a deed dated in 1850, this statute was referred to by the court.

[7] Rev. St. 1878, p. 632, § 2204. Section 2208, however, makes an exception in the case of the short form of deed (containing the words "hereby warrants") therein provided, and declares that one thus framed shall have the effect of covenants for title. See *infra*, p. 471.

[8] Comp. Laws, 1876, p. 5, § 5.

Nor do any covenants for title seem to be implied by statute at the present day in any other States than those now to be named.[1]

In Alabama, the 29th section of the act of 1805 was copied almost exactly from the Pennsylvania statute, and adopted in the Revised Statutes of 1823[2] and 1852,[3] and incorporated in the Revised Codes of 1867[4] and 1876.[5] The decision in Gratz *v.*

[1] In Iowa, the Revised Statutes of 1843, p. 204, provided that the words "grant, bargain, and sell," in all conveyances, shall, unless restrained by express words, "be construed to be the following express covenants: first, that the grantor was, at the time of the execution of such conveyance, seised of an indefeasible estate in fee simple in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrance done or suffered by the grantor, or any person claiming under him; third, for further assurance of such real estate to be made by the grantor and his heirs to the grantee, his heirs and assigns, and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance;" and upon this it was decided that all the covenants were express, that the covenants were general or absolute, and also that when the deed contained a covenant of warranty limited to the covenants of the grantor, it would not control the generality of the statutory covenants. Brown *v.* Tomlinson, 2 Greene, 525. Funk *v.* Cresswell, 5 Clarke, 62, was decided upon the Code of 1850, § 1232, and Crum *v.* Loud, 23 Io. 219, upon a deed framed in substance according to the Code. No such provisions are to be found in the Revised Code of 1860, or in that of 1884.

As to North Carolina, see Rickets *v.* Dickens, 1 Murph. (N. C.) 343; Powell *v.* Lyles, id. 348.

In Ohio, an act passed August 1, 1795, called 'A law establishing the Recorder's Office," was nearly or exactly copied from the Pennsylvania statute. It was afterwards repealed. Another act, passed January 2, 1815, gave a right of action in all cases where a deed contained a covenant of general warranty, in like manner as if the deed contained a covenant of seisin, and the same evidence to support the action and the same damages might be recovered as in an action on the covenant of seisin. This law was repealed and reenacted in substance on the 3d of February, 1824, and was entirely repealed by the act of March 12, 1831. The decisions under these statutes while in force are Innes *v.* Agnew, 1 Ohio, 389; Day *v.* Brown, 2 id. 346; Robinson *v.* Neil, 3 id. 525. The statute of 1815 seems not to have been very clearly expressed or distinctly understood. Day *v.* Brown, *supra;* see note to p. 274 of statute of 1841. The latest Revised Statutes (1884, 2 vols. and Supp.) are silent on this subject.

In South Carolina, an act passed December 12, 1795 (5 Stat. 256), gave a short form of a deed of lease and release, in which was a general covenant of warranty expressed in the usual form, but a proviso declared that the act should not be so construed as to oblige persons to insert the clause of warranty, nor to prevent them from inserting such clauses as should be agreed upon; see, as to the construction of this statute, Jeter *v.* Glenn, 9 Rich. Law, 374; Faries *v.* Smith, 11 id. 81.

[2] Tit. 18, c. 1, § 20.

[3] Rev. Code, 1852, part 2, tit. 1, c. 1, § 1314.

[4] Walker's Rev. Code, 1867, p. 368, § 1584.

[5] Code of Ala. 1876, p. 573, § 2193. The provision now stands as follows: "In all conveyances of estates in fee, the words 'grant, bargain, sell,' or either of them, must be construed (unless it otherwise clearly appear from the conveyance) an express covenant to the grantee, his heirs and assigns, that the grantor was seised of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, except the rents and

Ewalt was approved and applied to this act,[1] and in a case where the words of the conveyance were "bargained, sold, released, aliened, and confirmed," it was held,[2] upon a demurrer to the declaration, that these words did not come within the act, inasmuch as they imported no warranty at common law, and the statute, which altered the common law, should not have its meaning stretched beyond its letter, except in cases of public utility when the object of the act appeared larger than the enacting words, which, it was said, was not then the case. The statute not only altered the common law, but inasmuch as it created covenants for the party conveying by mere implication its tendency might be regarded as somewhat dangerous and as calculated to entrap the ignorant and unwary, and this decision was followed in a more recent case.[3]

In Arkansas, it was enacted in 1848 that "the words grant, bargain, and sell shall be an express covenant to the grantee, his heirs and assigns, that the grantor is seised of an indefeasible estate in fee simple, free from incumbrances done or suffered from the grantor, except rents or services that may be expressly reserved by such deed, as also for the quiet enjoyment thereof against the grantor, his heirs and assigns, and from the claim or demand of all other persons whatsoever, unless limited by express words in such deed. The grantee, his heirs or assigns, may in such action assign breaches as if such covenants were expressly inserted."[4] The statute has received the same judicial construc-

services that are reserved; and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by the express words of such conveyance; and the grantee, his heirs, personal representatives, and assigns, may, in any action, assign breaches, as if such covenants were expressly inserted."

[1] Roebuck *v.* Dupuy, 2 Ala. 541; Stewart *v.* Anderson, 10 id. 504.

[2] Gee *v.* Pharr, 5 id. 589.

[3] Clanch *v.* Allen, 12 Ala. 164. When it is said in Andrews *v.* McCay, 8 id. 928, that "the statute covenant was broken when the deed was made, and the general covenant of warranty (which was also in the deed) by the eviction under the sale," it is presumed the court did not mean to say that the implied covenant for quiet enjoyment was broken as soon as made, so as (in the absence of a covenant of warranty) to deprive an assignee of a remedy on the statutory covenants on the ground of its being a *chose in action* and therefore not assignable. See *supra*, § 205 *et seq.* This is here mentioned because many of the cases say, generally, in actions on the implied covenant for seisin and against incumbrances, "this was broken as soon as made," but no case will be found in which this has been said of the implied covenant for quiet enjoyment when that covenant was the one sued upon.

It is considered that these statutory covenants operate by way of estoppel, equally with express covenants. Blakeslee *v.* Mobile Life Ins. Co., 57 id. 205.

[4] Ark. Rev. St. 1848, p. 264; Davis *v.* Tarwater, 15 Ark. 289.

tion which, in Gratz *v.* Ewalt, was given to the Pennsylvania act,[1] and the recent Revised Code of 1884 contains the same provision.

In California, the Code of 1876 provides that from the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor, for himself and his heirs, to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance.

"1. That previous to the time of the execution of such conveyance, the grantor has not conveyed the same estate, or any right title or interest therein, to any person other than the grantee.

"2. That such estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor, or any person claiming under him. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance." [2]

There had been substantially the same provision in the Code of 1855.[3] None of these covenants, it is held, run with the land.[4]

In Dakota, the Revised Code of 1883 is, as to this, taken literally from that of California.[5]

In Delaware, "An Act for acknowledging and recording of deeds," similar in many of its provisions to the Pennsylvania statute, was passed in the year 1742, and its fifth section was identical with that statute.[6] The act of 1829 was, however, more concise, providing that "where there is no express covenant in a deed, the words 'grant, bargain, and sell,' shall, unless specially restrained, imply a special warranty against a grantor and his heirs, and all claiming under him," [7] and in the Revised Statutes of 1852 [8] and 1874 [9] the same phraseology has been adopted.

In Georgia, "a general warranty of title against the claims of

[1] Winston *v.* Vaughan, 22 Ark. 72. Unless the statutory words are limited by express words in the deed, the covenant must be construed as an express covenant against incumbrances done or suffered from the grantor. Brodie *v.* Watkins, 31 id. 319.

[2] 1 Hittell's Codes and Stat. Cal. 1876, p. 705, § 6113.

[3] 1 General Laws, 693; Wood's Dig. art. 388, § 9.

[4] Lawrence *v.* Montgomery, 37 Cal. 183. Bryan *v.* Swain, 56 id. 616, was a case of defence to payment of purchase money. Had the action been one on the covenant, the decision might have been different.

[5] Levisee's Rev. Code, p. 882, § 628.

[6] 1 Booth's Del. Laws, 222.

[7] Act of Feb. 7, 1829, § 5.

[8] Del. Rev. St. c. 83, § 3, p. 266.

[9] Rev. St. 1874, p. 500.

all persons includes in itself covenants of a right to sell, and of quiet enjoyment, and of freedom from incumbrances."[1]

In Illinois, the provision in the Revised Statutes of 1839 and 1845[2] was copied almost literally from the section of the Pennsylvania act; it was re-enacted in 1872,[3] and in the Revised Statutes of 1883,[4] and has received the same construction from the courts.[5] The covenants thus created were, it was once held, express and not implied covenants, made express by the very words of the statute, and could not therefore fall within the doctrine[6] that implied covenants are modified or restrained by express covenants in the same deed;[7] but in a later case it seems to have been considered that the statute, being in derogation of the common law, should be strictly construed, and hence that when the deed contained express covenants, the statutory covenants were inoperative.[8]

In Indiana, "any conveyance of lands worded in substance,

[1] Georgia Rev. Code of 1868, p. 513, § 2661, re-enacted in the same words in Rev. Code of 1882, p. 672, § 2703. In Burk *v.* Burk, 64 Ga. 632, the defendant claimed that this provision meant simply that the grantor warranted the title to the interest sold, subject to such incumbrances as might exist thereon, but the court held that "this warranty must be construed as though it had said in express terms that there were at the time of sale no incumbrances on the property sold. . . . And if there were, at the time of the making of the deed, any incumbrances thereon, and if the evidence shows that the plaintiff has sustained damages thereby, by being forced to pay off such incumbrances, this would constitute a breach of the warranty." This, of course, may give a broader effect to the statutory covenant than to a covenant of warranty, for although the fact of the plaintiff being *forced* to pay off an incumbrance would, according to the weight of authority, be a constructive eviction, yet it would not be if he paid it off voluntarily (*supra*, § 150), and yet this would entitle him to damages, measured by the amount paid, under the covenant against incumbrances (*supra*, § 192).

[2] Scates's Comp. 961; Gross's Stat., 1870, p. 85, § 11.

[3] Ill. Pub. Laws, 1871–72, p. 282, § 2. The irrelevant proviso in the Pennsylvania act (see *supra*, § 285) was also retained.

[4] Rev. St. 1883, p. 280.

[5] Prettyman *v.* Wilkey, 19 Ill. 235.

[6] *Supra*, § 275.

[7] Hawk *v.* McCullough, 21 Ill. 222. This case also held that the proper mode of declaring on such covenants was to set them forth at length as the statute declares their purport and meaning to be.

[8] Finley *v.* Steele, 23 Ill. 56. "The statutory provision," said the court, "does not create this covenant against the intention of the parties, but only where they intend that this statutory covenant shall operate and have effect, for the legislature has provided that these words shall not have this effect if they are limited by express words in the deed. It would seem to be clear that the employment of any language from which it appears the parties intended that these words should not have such an effect, would be sufficient to do away with this statutory covenant. The question then recurs whether that intention is manifested by the insertion of the general warranty in this deed," and this question was answered affirmatively. The Mississippi decisions (*infra*, p. 465) were considered to have been correctly made.

'A. B. conveys and warrants to C. D.,' shall be deemed and held covenants from the grantor and his heirs and personal representatives, that he is lawfully seised of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from incumbrances, and that he will warrant and defend the title to the same against all lawful claims." This was enacted in 1857,[1] re-enacted in 1876,[2] and incorporated in the Revised Statutes of 1881.[3]

In Maryland, the Revised Code of 1878, following a previous statute passed in 1864,[4] is partially taken from the act of 8 & 9 Victoria.[5]

[1] Act of March 2, 1857, p. 82; 1 Gavin & Hord's Stat., p. 260, § 12. While this State was a Territory, an act was passed in 1804, copied from the Pennsylvania statute of 1715, and by a subsequent act (Ind. Rev. St. 1843, c. 28, § 21) the provisions of the New York statute were copied, and until the act of 1857 no covenants were implied in that State by statute.

[2] Act of 1876, 1 Rev. St. p. 364, § 12.

[3] Ind. Rev. St. § 2927, the only difference from the acts of 1857 and 1876 being the insertion of the words "the said conveyance being dated and duly signed, sealed, and acknowledged by the grantor" before "shall be deemed and held to be," etc.

The course of decision under these statutes seems to have been thus: In Carver *v.* Louthain, 38 Ind. 530, while it was admitted that under a peculiar line of decision in that State (see *supra*, p. 113, n. 2) parol evidence was admissible to show that the vendee took subject to a certain incumbrance, yet that this did not apply to actions on the statutory covenants, but the court obviously held that these were to be "regarded and treated as though they were incorporated in the deed. They constitute a part of the deed as though they were written therein." This was affirmed in Kent *v.* Cantrall, 44 id. 316, and it was held that the covenant against incumbrances had the same force and effect as though written out in a deed at common law, the common law forms of pleading being applicable thereto, and that a grantee could voluntarily discharge an incumbrance and hold his grantor liable for its amount, and this was incidentally approved in Keiper *v.* Kline, 51 id. 316. The cases of Bethell *v.* Bethell, 54 id. 428, Craig *v.* Donovan, 63 id. 513, McClure *v.* McClure, 65 id. 482, and Fisher *v.* Parry, 68 id. 465, though actions on the statutory covenants, involved no question as to their *construction*, the question being whether the *lex loci contractus* or the *lex loci rei sitæ* should govern, as to which see *infra*, Ch. XIII.

[4] Acts of 1864, c. 252, § 1.

[5] Rev. Code, 1878, p. 394, tit. 24, art. 44, § 67. "When in a deed conveying real estate, the words 'the said . . . covenants' are used, such words shall have the same effect as if it was expressed to be by the covenantor for himself, his heirs, devisees, and personal representatives, and shall be deemed to be with the grantee in the deed, his heirs, devisees, and personal representatives and assigns.

"§ 68. A covenant by the grantor in a deed conveying real estate, 'that he will warrant generally the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs, devisees, and personal representatives, will forever warrant the said property unto the grantee, his heirs, devisees, and assigns, against the claims and demands of all persons whomsoever.

"§ 69. A covenant by a grantor in a deed conveying real estate, 'that he will warrant specially the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs, devisees, and personal representatives, will

In Mississippi, the section of the Pennsylvania act was copied almost literally in the statutes of 1822,[1] and re-enacted in the Revised Statutes of 1840,[2] and 1848,[3] and 1880.[4] In an early

forever warrant and defend the said property unto the grantee, his heirs, devisees, and personal representatives and assigns, against the claims and demands of the grantor and all persons claiming or to claim by, through, or under him.

"§ 70. A covenant by the grantor in a deed for land, 'that he is seised of the land, hereby conveyed,' shall have the same effect as if the grantor had covenanted that the said grantor at the time of the execution and delivery of the said deed is and stands lawfully seised of, in, and to the same.

"§ 71. A covenant by the grantor in a deed for land, 'that he has the right to convey said land,' shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey the said land unto the grantee in said deed, in the manner in which the same is conveyed, or intended so to be, by the deed according to its true intent.

"§ 72. A covenant by the grantor in a deed for land, 'that the said (the grantee) shall quietly enjoy said land,' shall have the same effect as if he had covenanted that the said (the grantee), his heirs and assigns, might at any and all times thereafter, peaceably and quietly enter upon and have, hold, and enjoy the land conveyed by the deed, or intended so to be conveyed, with all the rights, privileges, and appurtenances thereunto belonging, and to receive the rents and profits thereof, to and for his or their use and benefit, without any eviction, interruption, suit, claim, or demand whatever, by the said (the grantor), his heirs or assigns, or any other person or persons whatever.

"§ 73. A covenant by a grantor in a deed for land, 'that he has done no act to incumber said land,' shall be construed and have the same effect as if he has covenanted that he had not done or executed, or knowingly suffered any act, deed, or thing whereby the land and premises conveyed or intended so to be, or any part thereof, are or will be charged, affected, or incumbered in title, estate, or otherwise.

"§ 74. A covenant by a grantor in a deed for land, 'that he will execute such further assurances of said land as may be requisite,' shall have the same effect as if he had covenanted that he, the grantor, his heirs or personal representatives, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds, and things for the better, more perfectly and absolutely conveying and assuring the lands and premises hereby conveyed, or intended so to be, unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs and assigns, or his or their counsel learned in the law shall be reasonably devised, advised, or required.

"§ 75. All deeds which have been heretofore executed in pursuance of the provisions contained in the preceding sections from sixty-seven inclusive, shall be valid and effectual as if the covenants in said deeds had been expressed therein, in full.

"§ 76. The aforegoing forms, or forms to like effect, shall be sufficient, and any covenant, limitation, restriction, or proviso allowed by law may be added, annexed to, or introduced with the aforegoing forms."

[1] 13 June, 1822, c. 24, § 32.

[2] Ch. 34, § 32.

[3] Ch. 42, § 32, Hutchinson's Code, p. 610.

[4] Rev. Code, p. 345, § 1196. The provision as it now stands is: "The words 'grant, bargain, sell,' shall operate as an express covenant to the grantee, his heirs and assigns, that the grantor was seised of an estate, free from incumbrances, made or suffered by the grantor (except the rents and services that may be reserved), as also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in the conveyance; and the grantee, his heirs,

case,[1] the court gave no opinion as to the first of these implied covenants being limited to the acts of the grantor (though Gratz *v.* Ewalt was cited in the argument), but decided the case on the ground that the express covenant of warranty which the deed contained did away with the implied covenants.[2] "The covenants raised by law from the use of particular words in the deed are only intended to be operative when the parties themselves have omitted to insert covenants. But when the party declares how far he will be bound to warrant, that is the extent of his covenant." The effect of this is, of course, to deny to a purchaser the benefit of the statutory covenant for seisin when he has also received an express covenant of warranty, and under such circumstances it would seem that there could never be a recovery without an eviction.

In Missouri, since 1835, the Revised Statutes have provided that "the words grant, bargain, and sell, in all conveyances in which any estate of inheritance in fee simple is limited, shall, unless restrained by express terms contained in such conveyances, be construed to be the following expressed covenants on the part of the grantor, for himself and his heirs, to the grantee, his heirs

executors, administrators, and assigns, may, in any action, assign breaches, as if the covenants above mentioned were expressly inserted." Then follow provisions for "Forms for Conveyances," which, doubtless taken originally from the 8 & 9 Vict., will be found, more or less similar, in several of the States, viz. :

"§ 1231. A conveyance of land may be in the following form, and shall be as effective to transfer all the right, title, claim, and possession of the person making it as can be done by any sort of conveyance, viz. :

'In consideration of [here state it] I convey and warrant to —— the land described as [describe it]. Witness my signature the —— day of ——, 188–.

—— ——.'

"§ 1232. If only a special warranty is intended, add the word 'specially' to the word 'warrant' in the conveyance.

"§ 1233. The word 'warrant,' without restrictive words, in a conveyance shall constitute a covenant by the grantor that he and his heirs and personal representatives will forever warrant and defend the title of the property unto the grantee, and his heirs, representatives, and assigns, against the claims of all persons whomsoever, lawfully claiming the same.

"§ 1234. The words 'warrant specially' in a conveyance shall constitute a covenant that the grantor, his heirs and personal representatives, will forever warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns against the claims of all persons claiming by, through, or under the grantor."

[1] Weems *v.* McCaughan, 7 Sm. & Marsh. 427 ; see also Bush *v.* Cooper, 26 Miss. 599.

[2] This is correct when applied to the case of covenants contained in a conveyance for a term of years. In such case, the covenant implied from the words of leasing is annulled by the insertion of an express covenant. Nokes' case, 4 Rep. 80 ; Line *v.* Stephenson, 5 Bing. N. C. ; see *supra*, § 275. But this was not the law as to the conveyance of a freehold.

and assigns: first, that the grantor was, at the time of the execution of such conveyance, seised of an indefeasible estate in fee simple in the real estate thereby granted; second, that such real estate was, at the time of the execution of such conveyance, free from incumbrances done or suffered by the grantor, or any person under whom he claims; third, for further assurance of such real estate to be made by the grantor and his heirs to the grantee and his heirs and assigns; and may be sued upon in the same manner as if such covenants were expressly inserted in the conveyance."[1] This was re-enacted in the revision of 1845, 1855, 1865, and 1879,[2] and is still in force.[3] The second of these covenants is a limited one, while the first and third are general. In an early case,[4] the court, after a careful review of the English and Pennsylvania authorities, held that these three covenants were distinct and independent; the second might be superfluous, but it did not therefore limit the first, which was independent of, and not inconsistent with it, and this decision seems to have been consistently adhered to.[5] The covenant for further assurance was at one time held to be the only one which could be taken advantage of by an assignee of the land,[6] but more recent decisions have

[1] The first act was in 1804 (in Indiana Territory). In the same year it was enacted for the District of Louisiana, of which Missouri formed part until 1812; it was identical with the Pennsylvania statute. In the Revised Statutes of 1825 it was declared that "the words grant, bargain, and sell shall be adjudged express covenants for the bargainee or the grantee, his heirs and assigns, for the bargainor or grantor for himself, his heirs, assigns, and administrators, that the bargainor or grantor was, at the time of the execution of such deed, seised of an indefeasible estate in fee simple, in and to the lands, tenements, and hereditaments thereby granted, bargained, and sold, and that the same was then free from incumbrances done or suffered from the bargainor or grantor, his heirs and assigns, and all claiming under him; and also for further assurance thereof, to be made by the bargainor or grantor, his heirs and assigns, unless the same be restrained," etc. A reference to the legislation will be found in Clore *v.* Graham, 64 Mo. 249.

[2] Until lately, the constitution of Missouri required that the laws should be revised every ten years.

[3] Rev. St. 1879, p. 110, § 675.

[4] Alexander *v.* Schreiber, 10 Mo. 461.

[5] Collier *v.* Gamble, 10 id. 471; Armstrong *v.* Darby, 26 id. 520; Clore *v.* Graham, 64 id. 249; Koenig *v.* Branson, 73 id. 634. This last case was decided upon the point of variance.

[6] Collier *v.* Gamble, *supra*. In Shelton *v.* Pease, 10 id. 473, a purchaser took an express general covenant to warrant and defend against all titles, and particularly against a certain mortgage which had been executed by his grantor. He paid off this mortgage and then brought suit upon his covenants. It was, however, held by the court that there was no breach of the covenant of warranty, and that the mortgage could not come within the scope of the statutory covenant against incumbrances, because, the grantor having covenanted to warrant and defend against the mortgage, he could not be supposed to mean to covenant against its mere

gone so far as to hold that all the statutory covenants run with the land to the successive owners thereof.[1]

In Montana, it is provided: "The words 'grant,' 'bargain,' and 'sell,' in all conveyances hereafter made, in and by which any estate of inheritance, possessory title or fee simple is to be passed shall, unless restrained by express terms contained in such conveyance, be construed to be the following express covenants, and none other, on the part of the grantor, for himself, his heirs and assigns, to the grantee, his heirs and assigns: 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same real estate, or any right, title, or interest therein, to any person other than the grantee. 2. That such real estate is at the time of the execution of such conveyance free from incumbrances done, made, or suffered by the grantor or any person claiming under him; and such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."[2]

In Nevada, the words of the only statute on the subject are the same as those in Montana.[3]

In New Mexico, it is provided: "The words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs, to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect: 1. That the grantor, at the time of the execution of said conveyance, is possessed of an

existence, but only against an eviction under it, which the voluntary payment of the mortgage was not. See *supra*, § 150.

[1] Dickson *v.* Desire, 23 Mo. 151 (*supra*, p. 313, n. 1); Chambers *v.* Smith, id. 174; Armstrong *v.* Darby, 26 id. 520; Magwire *v.* Riggin, 44 id. 514. It is, however, held that these covenants do not operate to pass an after-acquired estate by estoppel. Gibson *v.* Chouteau, 39 id. 536, *supra*, p. 386, n. 4. The law is held otherwise in some States. *Supra*, p. 386, n. 2.

In Pratt *v.* Eaton, 65 id. 157, the deed was by husband and wife of her property, and inasmuch as the statute also provides that "no covenant, express or implied, in such deed shall bind the wife or her heirs except so far as may be necessary effectually to convey from her and her heirs all her right, title, and interest, expressed to be conveyed therein," (as to which see *infra*, Ch. XIII.), it was argued that the wife was not liable on the covenant by reason of the statute, and the husband was not bound, because she and not he was the "grantor," but the court held that the mere statement of such a proposition was its own refutation.

[2] Mont. Rev. St. 1879, p. 445, § 227. The words are exactly the same in Nevada, and both are evidently taken from the California statute of 1855, *supra*, p. 462.

[3] Act of Nov. 6, 1861 (first session), p. 14, § 20; 1 Comp. Laws (1873), p. 86.

irrevocable possession in fee simple to the property so conveyed. 2. That the said real estate, at the time of the execution of said conveyance, is free from all incumbrance made or suffered to be made by the grantor, or by any person claiming the same under him. 3. For the greater security of the person, his heirs and assignees, to whom said real estate is conveyed by the grantor and his heirs, suits may be instituted the same as if the conditions were stipulated in the said conveyance."[1]

In Tennessee, the system of conveyancing is said to date back to the North Carolina act of 1715,[2] which, like similar enactments in many of the Colonies, provided for the transfer of estates by husband and wife.[3] Until the Code of 1871, there was no statutory provision as to covenants, but it was there provided: "The following or other equivalent forms, varied to suit the precise state of facts, are sufficient for the purposes contemplated without further circumlocution. For a deed in fee with general warranty: 'I hereby convey to A. B. the following tract of land (describing it), and I warrant the title against all persons whomsoever.' Covenants of seisin, possession, and special warranty: 'I covenant that I am seised and possessed of the said land, and have a right to convey it, and I warrant the title against all persons claiming under me.'"[4] And this has been re-enacted literally in the Revised Statutes of 1884.[5]

In Texas, it is provided in the Revised Statutes of 1879:[6]

[1] Act of Jan. 12, 1852, Comp. Laws of New Mex. § 2750. The words "hereditary" and "irrevocable" naturally suggest the civil law origin of this legislation, and the Compiled Laws are printed in both English and Spanish.

[2] Chap. 38, § 5.

[3] It is one of the curious landmarks in the history of jurisprudence that although up to the year 1832, in England, the estate of a married woman could not be conveyed without levying a fine, (unless the case came within the custom of London, or there had been "dower uses" in the deed to her husband, as to which see *supra*, p. 23,) some of the earliest laws in the Provinces provided for the present mode of separate acknowledgment by the wife, (which, indeed, almost follows the exact words in a fine,) and in some of the Colonies, Pennsylvania certainly, custom had introduced the practice long before any such laws were enacted.

[4] Thompson & Stegers's Stat. of 1871, p. 939, § 2013.

[5] Tenn. Code of 1884, p. 500, § 2820; and the Supreme Court has said, "These provisions disclose a clear legislative intent to reduce the forms of conveyance to their simplest elements, and to give the largest meaning to granting words, unless limited by the instrument itself." Daly *v.* Willis, 5 Lea, (Tenn.) 100.

[6] Tex. Rev. Stat. 1879, p. 93, art. 557. Prior to this, there seems to have been only a statutory short form of deed, like that formerly in force in South Carolina (*supra*, p. 460, n. 1), and this is still retained in the Revised Statutes, with the addition: "No person shall be obliged to insert the covenant of warranty, or be restrained from

"From the use of the word 'grant' or 'convey,' in any conveyance by which an estate of inheritance or fee simple is to be passed, the following covenants, and none other, on the part of the grantor for himself and his heirs to the grantee, his heirs and assigns, are implied, unless restrained by express terms contained in such conveyance: 1. That previous to the time of the execution of such conveyance the grantor has not conveyed the same estate, or any right, title, or interest therein, to any person other than the grantee. 2. That such estate is at the time of the execution of such conveyance free from incumbrances. 3. Such covenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance."[1]

In Virginia, the Revised Statutes of 1849[2] were, as to this, abridged and adapted from the 8 & 9 Vict. c. 119, and have been re-enacted literally in the Codes of 1860[3] and 1873.[4]

inserting any clause or clauses in conveyances hereafter to be made that may be deemed proper and advisable by the purchaser and seller; and other forms not contravening the laws of the land shall not be invalidated." Rev. St. p. 93, art. 553. Art. 558 declares that the term "incumbrances" includes taxes, assessments, and all liens upon real property.

[1] The resemblance will be noticed to the statutes in California, Montana, and Nevada, except that the covenant against incumbrances in Texas is not limited to those made or suffered by the grantor.

[2] Rev. St. 1849, tit. 33, c. 117.

[3] Code of 1860, c. 117, § 9 *et seq.*

[4] Code of 1873, p. 893. It is there provided:

"§ 9. When a deed uses the words 'the said —— covenants,' such covenant shall have the same effect as if it was expressed to be by the covenantor, for himself, his heirs, personal representatives, and assigns, and shall be deemed to be with the covenantee, his heirs, personal representatives, and assigns.

"§ 10. A covenant by the grantor in a deed, 'that he will warrant generally the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of all persons whomsoever.

"§ 11. A covenant by any such grantor, 'that he will warrant specially the property hereby conveyed,' shall have the same effect as if the grantor had covenanted that he, his heirs and personal representatives, will forever warrant and defend the said property unto the grantee, his heirs, personal representatives, and assigns, against the claims and demands of the grantor, and all persons claiming or to claim by, through, or under him.

"§ 12. The words 'with general warranty,' in the granting part of any deed, shall be deemed to be a covenant by the grantor 'that he will warrant generally the property hereby conveyed.' The words 'with special warranty,' in the granting part of any deed, shall be deemed to be a covenant by the grantor 'that he will warrant specially the property hereby conveyed.'

"§ 13. A covenant by the grantor in a deed for land, 'that he has the right to convey the same to the grantee,' shall have the same effect as if the grantor had covenanted that he has good right, full power, and absolute authority to convey the said land, with all the buildings thereon, and the privileges and appurtenances thereto belonging, unto the grantee, in

The West Virginia Revised Statutes of 1879[1] copied exactly the words of the Virginia Code, and these have been re-enacted in the Amended Code of 1884.[2]

The Wisconsin Revised Statutes of 1878[3] provide that no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not,[4] but they make an exception in the case of the short form of conveyance provided by statute,[5] and declare that "such a deed shall have the effect of a conveyance in fee simple to the grantee, his heirs and assigns, of the premises therein named, together with all the appurtenances, rights, and privileges thereto belonging, with a covenant from the grantor, his heirs and personal representatives,

the manner in which the same is conveyed or intended so to be by the deed, and according to its true intent.

"§ 14. A covenant by any such grantor, 'that the grantee shall have quiet possession of the said land,' shall have as much effect as if he covenanted that the grantee, his heirs and assigns, might, at any and all times thereafter, peaceably and quietly enter upon and have, hold, and enjoy the land conveyed by the deed, or intended so to be, with all the buildings thereon, and the privileges and appurtenances thereto belonging, and receive and take the rent and profits thereof to and for his and their use and benefit, without any eviction, interruption, suit, claim, or demand whatever. If to such covenant there be added 'free from all incumbrances,' these words shall have as much effect as the words 'and that freely and absolutely acquitted, exonerated, and forever discharged, or otherwise by the said grantor or his heirs saved harmless and indemnified of, from, and against any and every charge and incumbrance whatever.'

"§ 15. A covenant by any such grantor 'that he will execute such further assurances of the said lands as may be requisite,' shall have the same effect as if he covenanted that he, the grantor, his heirs or personal representatives, will at any time, upon any reasonable request, at the charge of the grantee, his heirs or assigns, do, execute, or cause to be done or executed, all such further acts, deeds, and things, for the better, more perfectly and absolutely conveying and assuring the said lands and premises, hereby conveyed or intended so to be unto the grantee, his heirs and assigns, in manner aforesaid, as by the grantee, his heirs or assigns, his or their counsel in the law, shall be reasonably devised, advised, or required.

"§ 16. A covenant by any such grantor, 'that he has done no act to incumber the said lands,' shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered, any act, deed, or thing whereby the lands and premises conveyed or intended so to be, or any part thereof, are, or will be, charged, affected, or incumbered in title, estate, or otherwise. . . .

"§ 23. A covenant by a lessor, 'for the lessee's quiet enjoyment of his term,' shall have the same effect as a covenant that the lessee, his personal representatives and lawful assigns, paying the rent reserved, and performing his or their covenants, shall peaceably possess and enjoy the demised premises, for the term granted, without any interruption or disturbance from any person whatever."

[1] Rev. St. 1879, p. 473, c. 64, § 12 *et seq.*

[2] Warth's Amend. Code, c. 62, § 12 *et seq.*

[3] Rev. St. 1878, p. 632, § 2208. This is not practically altered in the Supplement of 1883, p. 469, § 2208.

[4] Taken of course from the New York Statutes; see *supra*, p. 438, n. 3, p. 459.

[5] Like those in so many of the Western States.

that he is lawfully seised of the premises, has good right to convey the same, that he guarantees the grantee, his heirs and assigns, in the quiet possession thereof, that the same are free from all incumbrances, and that the grantor, his heirs and personal representatives, will forever warrant and defend the title and possession thereof in the grantee, his heirs and assigns, against all lawful claims whatsoever; any exceptions to such covenants may be briefly inserted in such deed, following the description of the land."[1]

But as has been already said, this reference to local statutory provisions is submitted with much diffidence as to its correctness.

§ 287. The question how far covenants for title may be limited or enlarged by the operation of other covenants in the same deed has arisen upon both sides of the Atlantic in cases between express covenants, and in the United States, as has already been partially seen, between express covenants and those implied by local statutes.[2]

Covenants for title are of course either general, that is, covenants against the acts of all persons whomsoever claiming by title; or limited, that is, covenants against the acts of the covenantor or some other particularly named person;[3] and in the latter case they are of course not broken by the acts of any others than those named.[4]

But it sometimes happens that through accident or carelessness one or more limited covenants are found with one or more general covenants in the same conveyance, hence presenting the contradiction of a vendor being only willing to covenant against his own acts, while at the same time he covenants against those of all persons, and whether under such circumstances the general covenants are to enlarge those which are limited, or whether they are to be restrained by them, is often a question of some per-

[1] Messer *v.* Oestreich, 52 Wis. 685. And see *supra*, p. 459, n. 7.

[2] Although for the sake of convenience such statutory covenants are sometimes thus called implied covenants, yet it must be borne in mind that the statutes invariably declare that they shall be deemed to be express covenants.

[3] The form by which the covenants are thus restricted is given in the second chapter, *supra*, pp. 24, 28, 29; but as Sugden observes, "Although this is the usual and technical manner of restraining covenants, yet an agreement in any part of a deed that the covenants shall be restrained to the acts of particular persons will be good, notwithstanding that the covenants themselves are general and unlimited." Sugd. on Vend. 493; Brown *v.* Brown, 1 Lev. 57; see *infra*, § 295.

[4] *Supra*, pp. 24, 119.

plexity and importance;[1] for on the one hand, as has been said, "However general the words of a covenant may be, if standing alone, yet if from other covenants in the same deed it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, courts will limit the operation of the general words;"[2] and on the other, the application of the maxim, *Verba cartarum fortius accipiuntur contra proferentem*, would forbid the limitation of general covenants unless the intention clearly appear on the face of the instrument.

§ 288. Sugden has considered that four propositions can be deduced from the authorities, viz.:—

First. Where restrictive words are inserted in the first of several covenants having the same object, they will be construed as extending to all the covenants, although they are distinct.

Second. Where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or the covenants be inconsistent.

Third. As on the one hand a subsequent limited covenant does not restrain a preceding general one, so, on the other hand, a preceding general covenant will not enlarge a subsequent limited covenant.

Fourth. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of the others.[3]

[1] "Every case must depend upon the particular words used in the instrument before the court, and the distinctions will be found to be very nice and difficult." Note to Gainsford *v.* Griffith, 1 Saund. 59.

[2] Per Lord Alvanley in Hesse *v.* Stevenson, 3 Bos. & Pull. 575.

[3] Sugd. on Vend. (14th ed.) 605. Platt has arranged the cases under two heads: 1. Where words of qualification in the first part of a deed will apply to and limit covenants in general terms in a subsequent part of the deed; and, 2. Where a qualification in the latter part of the instrument will narrow a preceding covenant expressed in general language. Platt on Covenants, 358. Many of the cases, however, cited by Platt under the second head are placed by Sugden under the first. Dart, in his treatise on Vendors (5th ed. 789), in quoting the above classification of Sugden, observes: "Of the above propositions, the first, if read in connection with the above classification of the covenants and of their separate objects, seems to be warranted by the authorities; the second proposition (which together, or rather as connected with the first, has been disputed in Sweet's edition of Jarman on Conveyancing, vol. ix. p. 383) is perhaps hardly accurate; for although a prior general covenant will not, it appears, be restrained by a subsequent limited covenant having a different object, yet where two covenants relate to the same object, restrictive words in the second may, it seems, control the

§ 289. First. The case of Browning *v.* Wright[1] is a leading one upon the subject of one covenant being restrained by another, and is generally classed under the first of these heads. In a deed purporting to convey an estate of fee simple, there was, first, a warranty[2] by the covenantor against himself and his heirs, followed by a covenant that notwithstanding any act done by him he was seised, etc., without any manner of condition or restraint to alter or defeat the estate granted, "*and that* he had good right and full power to convey the same *in manner aforesaid*," and then followed limited covenants for quiet enjoyment and for further assurance. The covenantee was evicted[3] by a title not within the limited covenants, and on a demurrer to the declaration it was argued, on his behalf, that to adopt the rule contended for by the defendant — that the restriction of the prior special covenants must be engrafted on the subsequent general one — would be to establish the doctrine that whenever a special covenant was inserted, all general covenants must be restrained thereby. It was, however, said by the court, that if the doctrine did indeed necessarily follow, the demurrer could not be sus-

generality of the first. The third and fourth propositions seem to be unimpeachable." Some of the authorities, however, do not appear to take any distinction between cases where a general or unlimited covenant *precedes* a special or limited one, and where it *follows* it; in other words, the mere priority of position in the conveyance of one over the other seems very often to be thought a matter of little or no moment. Thus, in Iggulden *v.* May, 9 Ves. 325, it was said the exposition must be both *ex antecedentibus et ex consequentibus*, and in a note to Gainsford *v.* Griffith, 1 Saund. 60 *a*, where some distinctions are noticed with respect to this matter of priority, Sergeant Williams observes: "It is questionable whether much regard would now be paid to this mode of construction. The chief object of courts of law at present is to discover the true meaning of the parties, and to construe the covenants accordingly. As far as the difference above laid down would tend to find out the intention of the parties, so far would it now be adopted and no further. The proper rule seems to be that which Lord Mansfield laid down in a case where the question was whether certain words in a covenant amounted to a condition precedent or not, 'that the dependence or independence of covenants was to be collected from the sense and meaning of the parties, and that however transposed this might be in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance.'" Kingston *v.* Preston, cited in Jones *v.* Barkley, Doug. 684. So it was said by Dallas, C. J., in Foord *v.* Wilson, 8 Taunt. 543, noticed *infra*, p. 477, "The order in which the covenants stand, however transposed, is comparatively unimportant," and it was so considered in Emmet *v.* Quinn, 7 Ontario App. 306, 324.

[1] 2 Bos. & Pull. 13.

[2] Expressed as in Williams *v.* Burrell, *supra*, p. 444, n. 3.

[3] It was a constructive eviction. The covenantee became a tenant under the superior title. The reporters doubt, in a note to the case, whether this would be an eviction, and at that day it would probably not have been so considered. But see *supra*, § 131 *et seq.*

tained; but the question was not whether a special covenant will restrain a general one, but whether the particular covenant on which the action was brought was general or special, and Lord Eldon [1] (after premising that in conveyances of a fee simple estate the purchaser was, according to the general practice, entitled to limited covenants only [2]) said: "My opinion upon considering the whole deed is that it is a special one. What would be the use of the other covenants, if this were general? It would be of little service to the grantor to insist that the warranty, and the covenants for quiet enjoyment and further assurance, were specially confined to himself and his heirs, if the grantee were at liberty to say, 'I cannot sue you on these covenants, but I have a cause of action arising upon a general covenant which supersedes them all.' It appears to me, from the words and context of the deed, that in such case we should be driven to say, that the grantor intended at the same time to give a limited and an unlimited warranty. The true meaning, therefore, of the covenant is, that the grantor has power to convey and assure according to the terms used, to which terms he refers by the words 'in manner aforesaid,' namely, 'for and notwithstanding anything by him done to the contrary.'" [3]

[1] Then Ch. J. of the Common Pleas.

[2] As to this, see *supra*, § 25 *et seq.*

[3] Lord Eldon added: "With respect to the cases which have been cited, it is to be observed that when a general principle for the construction of an instrument is once laid down, the court will not be restrained from making their own application of that principle, because there are cases in which it may have been applied in a different manner. The principle being once acknowledged, the only difficulty consists in making the most accurate application of it."

In the early case of Nervin *v.* Munns, 3 Lev. 46, the vendor covenanted that notwithstanding any act done by him to the contrary, he was seised in fee, that he had good right to convey, that the lands were clear of all incumbrances made by him, his father or grandfather, and that the vendee should quietly enjoy the estate against all persons claiming under the vendor, his father or grandfather; and it was held that the second covenant, though general, was restrained by the first to acts done by the vendor. So in Gervis *v.* Peade, Cro. Eliz. 615, tenant *pur autre vie* made a lease for twenty-one years, and covenanted that he had not done any act to prejudice the said lease, but that the lessee should enjoy it against all persons. The *cestui que vie* died, and the lessee, being evicted, brought covenant against his executor, "and it was adjudged that it lay not, for the last words, 'but that he shall enjoy it against all persons,' refer to the first words, viz. 'for any act done by him,' and so the covenant is not broken." So in Clanrickard *v.* Sidney, Hob. 273, where in a grant of the third part of certain lands there was a covenant for quiet enjoyment of such third part, and a general covenant for further assurance, it was held that the latter was "restrained to the limits of the bargain, being joined to the former covenant of enjoyment under the same line and covenant as depending upon it, which was expressly only of the third part." In the case in the Irish Chancery of Martyn *v.* M'Namara, 4 Dru. & War. 424, where certain fee simple estates and also lands held under

An early case in New York [1] was somewhat similar to Browning *v.* Wright, and was decided upon its authority. An undivided moiety of land was conveyed, "containing, by estimation, six hundred acres, and the same is hereby covenanted and warranted to contain at least five hundred acres." There was a limited covenant that in case of eviction from all or any part of the granted premises, the grantor should not only refund a proportional part of the consideration money, but should pay the value of the improvements, etc. Then followed a covenant for seisin and right to convey "in manner and form aforesaid." "There were also," the report says, "covenants for quiet enjoyment, against incumbrances, for further assurance, and a warranty," but whether these were general or limited is not mentioned. In the course of the prior conveyances from the original patentee to the defendant, there had been some reservations of certain parcels of the land, amounting altogether to several hundred acres, and although the plaintiff had actually received, under his deed from the defendant, over seven hundred acres exclusive of these reservations, he contended that the covenant for seisin, being general, was broken as to these parts; that by warranting that there should be five hundred acres *at least*, the inference was that there might be more, and, if more, that the covenants were to extend to it. As it has been conclusively settled that covenants for title do not extend to the *quantity* of land conveyed, unless such clearly appear to be the intention,[2] it is difficult to perceive how there could, on this ground, have been a doubt as to the decision. The case was, however, considered by the court without reference to this principle, and it was held that the first warranty, being only to the extent of five hundred acres, the other covenants went no further, the words "in manner and form aforesaid" being sufficient to connect them with this limited covenant.[3]

leases for life renewable forever were conveyed to trustees under a marriage settlement, with a covenant by the settlor with the lady's father that the property was of a given value, followed by a general covenant for good title, and then a particular covenant by the settlor during his life to renew these leases, then succeeded limited covenants for quiet enjoyment and for further assurance, the remarks of the Chancellor (Sugden) as to the effect of these covenants upon each other did not form any part of the decision, he saying expressly, "I am not now to decide the question as to the legal extent of this covenant."

[1] Whallon *v.* Kauffman, 19 Johns. 98.

[2] See *infra*, § 297.

[3] Davis *v.* Lyman, 6 Conn. 252, was a very clear case. In a conveyance of a fee

Browning *v.* Wright was followed in England by a case[1] where the assignor of a term of years covenanted that he had done no act to incumber, that notwithstanding any such act the lease

simple estate, the vendor covenanted that he had done no act to affect the title, and that the premises were clear of all mortgages, judgments, or liens of the said parties of the first part of any nature or kind whatsoever, followed by a limited covenant of warranty, and it was held that all the covenants were limited, which was unquestionably correct, not only on account of the intimate connection between the first and second covenant, but from the very words of the covenants. In Miller *v.* Heller, 7 Serg. & Rawle, (Pa.) 32, Miller had, in June, 1789, purchased land at sheriff's sale, as the estate of Jones. In November of that year, and while the latter was still in possession, Miller assigned his estate in the land to Heller, giving him a bond with this recital and condition: "Whereas George Miller above said, by a certain assignment on a deed executed by the sheriff of Northumberland County to him (Miller) for certain premises therein described, did grant, bargain, sell, and convey the said premises, by a warranty in said assignment mentioned, unto him, the said John Dieter Heller, and to his heirs and assigns forever; now the condition of the above obligation is such, that if the above bounden Miller or his heirs shall and do deliver peaceable possession of said premises to said Heller or his heirs, at or before the fifteenth day of April now next, and warrant and defend the said premises against the present possessor, Jones, and all and every person attempting to hinder said Heller or his assigns from taking possession thereof as is aforesaid, and against said Miller and his heirs and assigns, then the obligation to be null," etc. Miller brought an ejectment against Jones, in which he recovered possession, and delivered it to Heller; but the latter, being afterwards evicted by one who claimed under Jones, brought debt on the bond. The court held, however, that the condition in the bond was evidently limited in its application to Jones himself, and not only did not extend to any one claiming under him, but was confined to the single act of putting the plaintiff in possession at or before a certain time, and this having been done the condition of the bond was satisfied.

So on the other hand, in Ireland *v.* Bircham, 2 Scott, 207, 2 Bing. N. C. 90, it was held that a covenant for quiet enjoyment was tied up until the lease to which it related should be a lease in possession. The defendant and another leased to the plaintiff the residue of a term of thirty years granted in August, 1815, to commence on the expiration of a lease for twenty-one years granted in November, 1815; that is to say, the residue then demised was to commence in 1836. The lessor covenanted severally but not jointly, nor the one for the other, that the plaintiff, *paying the rent reserved* and performing the other covenants in the lease contained, should, *during the term demised*, quietly enjoy the premises without disturbance of the defendant or his co-lessor, or of any person claiming by, from, or under them or any of them. This co-lessor having failed in payment of the rent due to the original grantor of the lease, the latter, in 1827, evicted the plaintiff, who had been previously in possession under the lease of November, 1815, who then brought covenant, and it was held by the court (Tindal, C. J.) that the covenant in question was tied up to a covenant for quiet enjoyment *during the term;* that the words, the plaintiff *paying the said rent*, etc., should *during the term thereby demised* quietly enjoy, was a conditional covenant, and the condition was only to be performed when the lessee should be in possession of the premises under the lease; it was, therefore, only a prospective covenant for quiet enjoyment for a term, to commence in 1836, and as the condition could not take effect till that period should have arrived, so neither could the obligatory part of the covenant.

[1] Foord *v.* Wilson, 8 Taunt. 543; 2 J. B. Moore, 592.

was a good and subsisting one, and that he had good right to assign in manner aforesaid. Notwithstanding it was urged with much force that in the conveyance of a leasehold estate, where the title could not be so easily examined as in the case of a freehold,[1] the purchaser must expect greater security from the covenants, it was clearly held by the court that the intention of the parties was too plain to be gotten over, that the words "and that" connected the general covenant with the preceding limited one, and that the case was not distinguishable from Browning *v.* Wright, the only difference being as to the nature of the estate transferred.

A later case went further than these.[2] The vendor of a term of eleven years, if S. C. should so long live, covenanted that notwithstanding any act done by him the lease was valid, and that the same and the term of eleven years therein expressed were respectively in full effect, and in no wise determined or prejudicially affected otherwise than by effluxion of time; and also that notwithstanding any such act the vendor had full power to sell for the residue unexpired by effluxion of time; then followed limited covenants for quiet enjoyment and for further assurance. The life, however, on which the lease depended, had dropped before this assignment, and the covenantee was evicted by the remainderman. It was urged for the plaintiff that the words in the second covenant, "otherwise than by effluxion of time," rendered the idea of its restriction nonsensical, as effluxion of time could have been no act of the covenantor; but it was nevertheless held that these words were indeed unnecessary, but that too strong inferences could not be safely drawn from that quality in legal documents; that on the other hand, the absurdity of guarding himself from covenanting against any acts but his own, and in the same breath covenanting that the term was not affected by the acts of any person whatever, was glaring, and was rendered still more so by the repetition of the qualifying words in the succeeding covenants, and it was held that the case came within the authority of Browning *v.* Wright.[3]

[1] See *supra*, § 26.

[2] Stannard *v.* Forbes, 6 Ad. & Ell. 572; 1 Nev. & Perry, 633.

[3] "In performing this task on any particular occasion," said Lord Denman, "we are not likely to derive much assistance from the former decisions that may be cited, as every instrument varies in some respects from all others, and must be interpreted according to its own lan-

The class of cases, then, which may be said to be based upon Browning *v.* Wright, appears to decide that where the instrument contains one or more general or unlimited covenants, which are connected with or refer to and have the same object as one or more preceding limited covenants so as to join the latter with the former, it will be inferred that the covenantor intended that all the covenants should be restricted to his own acts or the acts of those claiming under him, and the preceding limited covenants will qualify and restrain the general ones; in other words, when it clearly appears that the covenants are, as it were, cast in one mould, all having the same extent, courts will not pick out one of them in which the limitation is less strongly or distinctly expressed than in the others, and upon it fasten on the covenantor a general liability.

§ 290. In the absence, however, of any such direct connection with or reference to each other as would clearly lead to the above

guage. It should seem that the true grammatical sense of the words employed, when that can be ascertained, must prevail; and no case can be quoted in which our courts have thought themselves at liberty to act in direct contravention of it. Such a course might indeed become necessary, for a deed may contain repugnant clauses; where these occur, the authorities fully warrant us in comparing the clause under immediate consideration with all which precedes and follows it, even though not forming parts of the same sentence, and with the nature of the obligations entered into, for the purpose of discovering and effectuating the intention really expressed by the parties."

In all these cases it will be observed that the words of connection between the covenants were copulative conjunctions. But in Broughton *v.* Conway, Dyer, 240, (see this case approved by Lord Ellenborough in Gale *v.* Reed, 8 East, 89, and applied to covenants contained in an agreement for the dissolution of a partnership,) a covenant that the vendor had not done any act whereby the grant might be in any manner impaired, *but that* the latter might enjoy without the disturbance of him or any other person, was held to be confined to acts done by the vendor; though of this case Sugden remarks: "Certainly there were express words to get over, namely, 'or any other person,' which circumstance does not occur in any other of this line of cases, in all of which the reader will perceive that no word was rendered inoperative (except perhaps in Stannard *v.* Forbes, where the words 'otherwise than by effluxion of time' were rendered inoperative or useless by the construction adopted by the court). But the introductory clause was merely held to extend over all the distinct covenants, in the same manner as a general introduction to a will frequently influences the whole will." 2 Sugd. on Vend. (10th ed.) 528. This comment is omitted in the 14th edition.

In Petes & Jervies's case, cited in the note to Broughton *v.* Conway, Dyer, 240, "Tenant *pur autre vie* leases for twenty-one years, and covenants that he has not done any act, *but* the lessee shall or may enjoy it during the years. Afterwards, within the twenty-one years, *cestui que vie* dies; adjudged that the action of covenant does not lie, for *but* refers the words subsequent to the words preceding." The case is the same as Gervis *v.* Peade, reported Cro. Eliz. 615. See *supra*, p. 475, n. 3.

conclusion, when the limited covenants belong to a different class, or rather have a different object from the unlimited ones, they will be held to produce no effect upon each other, and the former will not qualify the latter.

This distinction between the different covenants was briefly recognized in an early case,[1] and was subsequently carried to its full extent in Howell *v.* Richards.[2] The defendant covenanted that notwithstanding any act done by him he was seised and had good right to convey, "and likewise" that the plaintiff should quietly enjoy without the interruption of the defendant or his heirs or any other persons whatsoever, followed by a similar general covenant against incumbrances, "excepting only a chief rent." It was contended (partially on the authority of Browning *v.* Wright) that these last two general covenants were restrained by the former limited ones, but Lord Ellenborough held that there was no connection whatever between them. Not only were there no such copulative words as to lead to the conclusion that they were all to be considered together, but great stress was laid upon the different character and object of the limited and of the general covenants.[3]

[1] Norman *v.* Foster, 1 Mod. 101, where Hale, C. J., said, "If I covenant that I have a lawful right to grant, and that you shall enjoy notwithstanding any claiming under me, these are two several covenants, and the first is general and not qualified by the second," to which Wylde, J., agreed, and said that one covenant went to the title and the other to the possession.

[2] 11 East, 633.

[3] "It is perfectly consistent with reason and good sense that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment. [As to this see the remarks of Tilghman, J., in Bender *v.* Fromberger, 4 Dall. (Pa.) 441, cited *infra*, p. 489, n. 4.] He may suspect or even know that his title is, in strictness of law, in some degree imperfect; but he may at the same time know that it has not become so by an act of his own; and he may likewise know that the imperfection is not of such a nature as to afford any reasonable chance of disturbance whatever to those who should take under it; he may therefore very readily take upon him an indemnity against an event which he considers as next to impossible, whilst he chooses to avoid a responsibility for the strict legal perfection of his title to the estate, in case it should be found at any future period to have been liable to some exception at the time of his conveyance. He may have a moral certainty that the existing imperfections will be effectually removed by the lapse of a short period of time, or by the happening of certain immediately then impending or expected events of death, or the like; but these imperfections, though cured so as to obviate any risk of disturbance to the grantee, could never be cured by any subsequent event, so as to save the breach of his covenant for an originally absolute and indefeasible title. The same prudence, therefore, which might require the qualification of one of these covenants might not require the same qualification in the other of them, affected as it is by different considerations and addressed to a

So in Duval *v.* Craig[1] the vendors covenanted that the premises were free of all incumbrances created or suffered by them or either of them, and that they would, against themselves and all and every person whomsoever, warrant and defend the premises, "with this warranty and no other, to wit, that if the said land or any part thereof shall at any time be taken by a prior legal claim or claims, that then and in such case" they would make good the part so lost with other land of equal quality and quantity, to be adjudged of by two impartial men, etc. "It is contended," said Story, J., who delivered the opinion, "that the two covenants in the deed are so knit together that they are to be construed in connection so that the clause as to an indemnity with other lands, in case of an eviction by a prior legal claim, is to be applied as a restriction to both covenants, and if so, then the action cannot be sustained, for the declaration does not allege any eviction, or any demand or refusal to indemnify with other lands. There is certainly considerable weight in the argument. It is not unreasonable to suppose that when the parties have provided a specific indemnity for a prior claim, they mean to apply the same indemnity to all the other cases enumerated in the first covenant. But something more than the mere reasonableness of such a supposition must exist to authorize a court to adopt such a construction. The covenants stand distinct in the deed, and there is no incongruity or repugnancy in considering them as independent of each other. The first covenant being only against

different object." Lord Ellenborough added that he did not find any case in which the covenant for quiet enjoyment was all one with the covenant for title, or parcel of that covenant, or in necessary construction to be governed by it otherwise than as, according to the general rules for the construction of deeds, every deed was to be construed; that is, according to the intention of the parties. In this decision little stress appears to have been laid on the presumption that the covenant against incumbrances was meant to extend beyond the acts of the covenantor from the fact that there *was* expressly excepted "the chief rent issuing to the lord of the fee, if any such should be due;" and on the maxim that *expressio unius est exclusio alterius*, it might be fairly inferred that this was to be the only exception. The distinction noticed in Howell *v.* Richards between the different natures of the covenants was also observed in the opinion delivered by Sewall, J., in Sumner *v.* Williams, 8 Mass. 162, already referred to: "The covenants preceding and the covenants subsequent to the covenant against incumbrances are not of the same import. Covenants respecting the seisin, the power to convey, and the general title, may well consist with a restrictive covenant against incumbrances. 2 Roll. 250, l. 5. And, taken together, the several covenants stand unconnected in sense and expression, and uncontrolled the one by the other." See also Peters *v.* Grubb, 21 Pa. 460.

[1] 2 Wheat. (S. C. U.S.) 45.

the acts and incumbrances under the parties to the deed, which they could not but know, they might be willing to become responsible to secure its performance by a pecuniary indemnity; the second including a warrant against the prior claims of strangers also, of which the parties might be ignorant, they might well stipulate for an indemnity only in lands of an equivalent value. The case ought to be a very strong one which should authorize a court to create, by implication, a restriction which the order of the language does not necessarily import or justify. It ought to be one in which no judicial doubt could exist of the real intention of the parties to create such a restriction. It cannot be pronounced that such is the present case." [1] The case of Estabrook *v.* Smith,[2] in Massachusetts, went beyond this, and apparently further than the authorities warrant. There the deed contained a covenant against all incumbrances except a certain mortgage, followed by a general covenant of warranty, and it was claimed for the defendant that the exception of the mortgage in the covenant against incumbrances extended to the covenant of warranty, but the court conceived that as the two covenants were not connected covenants, of the same import and directed to one and the same object, the one was not qualified by the other. "The defendant," said Metcalf, J., "might well covenant to warrant against the eviction of the plaintiff by the holder of the mortgage, though he could not covenant against *all* incumbrances without rendering himself forthwith liable to an action for nominal damages at least for breach of such covenant." In a later case in Ohio, however, where the covenants were practically to the same effect, the authority of this case was denied, and a different construction adopted by the court.[3]

In Nind *v.* Marshall,[4] however, the covenants in the assignment of a leasehold were, that notwithstanding any act done by the seller the lease was a valid one, and further, that the purchaser

[1] So in a case in the Irish Queen's Bench (Kean *v.* Strong, 9 Irish L. 74, where it was urged that an unlimited covenant for the renewal of a lease was not qualified by a subsequent limited covenant for quiet enjoyment) it was said, "It has never been held, and it would be against principle to hold, that one distinct express covenant should qualify another express covenant neither grammatically nor substantially connected with the former." And see this case *infra*, p. 491, n. 5.

[2] 6 Gray, (Mass.) 572.

[3] Bricker *v.* Bricker, 11 Ohio, 240. See Jackson *v.* Hoffman, *infra*, p. 499, n. 1.

[4] 1 Brod. & Bing. 319; s. c. 3 Moore, 702.

might peaceably enjoy without interruption from the seller, his executors, etc., *or any other person or persons whomsoever* having or lawfully claiming any estate in the premises, *and that* free from incumbrances by the seller, concluding with a limited covenant for further assurance. Here, then, were three limited covenants, and one — the covenant for quiet enjoyment — unlimited, if it were to be construed as standing alone. The plaintiff having been evicted by a title paramount to that of the defendant, it was strongly urged that the case was identical with Howell *v.* Richards, the limited covenants being those which assured the title, and the absolute one that which assured the possession, and hence the reasoning of Lord Ellenborough was directly applicable, and further, that a different construction would render inoperative the words "or any other person or persons whomsoever." It was, however, held [1] that the case was distinguishable from Howell *v.* Richards, which, it was said, proceeded mainly upon the exception of a chief rent from the covenant against incumbrances, which thereby indicated that with that exception the covenant was to be a general one; but that in this case the covenant against incumbrances, which was unquestionably limited, was intimately connected with that for quiet enjoyment; so much so, that there would be no use of superadding that no judgment suffered by the covenantor should operate to the covenantee's disturbance, if the covenant for quiet enjoyment were to stand absolute and unqualified, that no lawful claim whatever should operate to his disturbance. With respect to the generality of the expression "all persons whomsoever," said Dallas, C. J., "I think that those must be construed to mean persons of the description in the other covenants, that is, persons claiming under the covenantor, or persons claiming under them." But Park, J., in dissenting, observed that the circumstance of the chief rent in Howell *v.* Richards formed no ingredient in the judgment in that case; "it was not even hinted at, and was only mentioned by Lord Ellenborough in stating the record;" and indeed the distinction taken by that learned judge (which Sugden has observed to be a very just one) between the different natures of the covenants, seems not to have been observed in Nind *v.* Marshall.[2]

[1] Dallas, C. J., and Richardson and Burroughs, JJ. (Parks, J., dissenting).

[2] So in Thompson *v.* Thompson, 6 Irish. R. Eq. 113, a father, seised of lands under a lease for three lives, conveyed them upon the marriage of his son, in

In a more recent case,[1] a house which had been the property of Ann Hopley was, after her death, sold by her daughter as her

strict settlement, by words applicable to lands held in fee simple, with a recital that he was seised of them in fee, and with covenants on the part of father and son that the lands should continue to the several uses of the settlement, *and that* free and clear from all former grants, incumbrances, etc. made or suffered by both or either of them. The court, relying on Nind *v.* Marshall, held that the two covenants formed "either one entire covenant, or at least one single clause," and that the general terms of the covenant for quiet enjoyment were restricted by the covenant against incumbrances. In Dickinson *v.* Hoomes, 8 Grat. (Va.) 353, the authority of Nind *v.* Marshall was relied upon, but not sustained by the court. The case is noticed at some length in the fourth edition of this treatise, p. 510. The student must not mistake the dissenting opinion of Moncure, J., which is fifty-five pages long (pp. 383–438), for the opinion of the majority of the court, which was delivered by Allen, J., p. 438, and occupies but a single page, as the former opinion is printed first, immediately after the arguments of counsel.

In considering the cases of Howell *v.* Richards and Nind *v.* Marshall, their difference seems to be this. In the former it was not clear that the covenantor did not mean the covenants for quiet enjoyment and against incumbrances to be unlimited, both from the fact of the chief rent being the only exception to the latter and for the reason that a covenantor might not feel safe in warranting the absolute perfection of his title, though he would feel justified in warranting against the improbable *consequences* of a flaw in it. Here then the apparent intention of the covenantor, and the rule *Verba cartarum fortius accipiuntur contra proferentem*, went together, and the two covenants were accordingly held to be unlimited. But in Nind *v.* Marshall, if the intention of the covenantor had been that one of the covenants should be unlimited, as it might seem on the one hand to be from the use of the words "and all persons whomsoever," the direct words of connection with the other limited covenants would have to be disregarded; while on the other hand, if the intention were that all the covenants should be limited to his own acts, the words "and all persons whomsoever," would either have to be disregarded or receive a somewhat forced construction. There can be little doubt that the latter was the intention of the draftsman, who evidently had not in his mind the train of reasoning noticed by Lord Ellenborough, and in this dilemma the intention of the covenantor was construed with much liberality. Indeed, the rule of law which requires a strict construction put on the words of the party using them is as to this subject seldom or never applied, except where the intention of the covenantor evidently harmonizes with the rule, and its application is therefore useless. It is certainly hard on the one hand that the use of a certain form of expression should fasten upon a party a liability where there are other expressions which raise a doubt as to whether he intended that such should be the case; but as was said by Bayley, J., in Barton *v.* Fitzgerald, 15 East, 546, "I admit that the words of a covenant may be restrained by other words in the deed, if we can see a clear intention to restrain them from the other parts of the deed. But it would be a very dangerous rule if it were to be applied to every case where ingenuity can show that by giving the natural meaning to the words of the general covenant, other words in other parts of the deed might be rendered nugatory." This case of Barton *v.* Fitzgerald depended, as Sugden says of it, on very particular circumstances. In an assignment of a lease, reciting the lease to be for the term of ten years, there was a covenant that the vendor had done no act to incumber, except an underlease, "and also" that the lease was subsisting, and not void or voidable, together with limited

[1] Young *v.* Raincock, 7 C. B. 310.

heir, whose husband covenanted with the purchaser that notwithstanding any act or default of him, his wife, or Ann Hopley, the grantors were seised; that notwithstanding any such act or default, they, or one of them, had good right to convey; that the covenantee should quietly enjoy without interruption from them or either of them, or any one claiming under Ann Hopley; and that the grantors, and every one claiming under them or under Ann Hopley, should make further assurance upon reasonable request. It turned out that the daughter was illegitimate, and the purchaser was evicted by the rightful heir. It was clear that the only covenant upon which the plaintiff could recover was that for quiet enjoyment, as the entry of the heir was not caused by any act or default of Ann Hopley. The defendant therefore contended, on the authority of Browning *v.* Wright and Nind *v.* Marshall, that the restrictive words must be drawn down from the first two covenants and embodied in the third, but the court ordered judgment to be entered for the plaintiff.[1]

covenants for quiet enjoyment and for further assurance. It turned out, though there was no mention of it in the recital, that the lease was for ten years, if another should so long live, and upon the death of the *cestui que vie* the term expired, when the purchaser brought covenant. It was held by Lord Ellenborough, the other judges concurring, that the second covenant was general and unlimited, and could not be restrained by the limited ones. The opinions proceeded mainly on the recital, which was, that the premises were demised for a term of ten years, and that by assignment in the following year they had become vested in the then assignor for the remainder of the term. "Then when he covenants," said Le Blanc, J., "that the lease is valid in law for the premises thereby assigned, is not that a covenant that it is a lease valid for the whole term for which it is before expressed that it had to run?" And Lord Ellenborough said, "If the rest of the covenants had imported a contrary intent to the general words then appearing to have been improvidently introduced into one part of a deed, the case would have admitted of a different consideration."

In Coates *v.* Collins, L. R. 6 Q. B. 469, a tenant for three lives conveyed, with the ordinary covenants for title limited to his own acts, and the covenant that the lease was a good, valid, and subsisting lease in the law for the said three lives, and not forfeited, surrendered, or become void or voidable. One of the *cestuis que vie* being then dead, the assignee brought covenant, but the court held, though with much doubt and one judge dissenting, that the mention of the three lives was mere matter of description, and that the covenant only amounted to a covenant that the lease was still subsisting, and not that the three lives were still in existence.

[1] "It cannot be disputed," said Coltman, J., who delivered the opinion of the court, "that the general introductory words of one of the usual covenants for title may be drawn down in this way and applied to others in which they are not to be found, where, from what is found in other parts of the deed, it appears that such must have been the intention of the parties." But he held that such was not the intention, and said, "The covenant, as it stands, without the restrictive words, is quite consistent with the covenant for further assurance, by which it is covenanted that Raincock and wife, and every

So where, in the assignment of a lease from the plaintiff to the defendant, the latter covenanted that he would, so long as he should be in possession of the rents and profits, pay to the original lessors the rent reserved, and perform the covenants contained in the lease from them to the plaintiff, and keep him harmless and indemnified of and from the rents and covenants.[1] The breach assigned was that certain rents became due to the owners of the reversion, which the plaintiff was obliged to pay, and the jury having found that the defendant was not in possession of the rents and profits at that time, the latter contended that the covenant to indemnify was restricted to such time as he should be in possession. But the court held that the possibility of a resale must have entered into the minds of the parties. On such sale taking place, it was to be expected that covenants would be entered into by the purchaser to perform the covenants of the original lease, but the purchaser might make default in performing them, and it was therefore reasonable that the plaintiff should require from the defendant a covenant to indemnify him against any breach of those covenants. It was therefore held that the covenant to indemnify was not restricted, and judgment was entered for the plaintiff *non obstante veredicto*.[2]

other person claiming under them or either of them, or under Ann Hopley, shall make further assurance on every reasonable request. But if the restrictive words which it is sought to introduce into the covenant for quiet enjoyment are to be considered as introduced into it, and have the effect contended for — that the entry by Peter Hopley, not being occasioned by any act or default of Mrs. Hopley, is not a breach of the covenant for quiet enjoyment — this inconsistency will result from it, that the covenant for quiet enjoyment will not extend to protect the purchaser from a disturbance by Peter Hopley, but the covenant for further assurance will entitle the purchaser to a conveyance from Peter Hopley of his right to the estate, or, in case of refusal, entitle him to maintain an action against the present defendant for such refusal." In Austin *v.* Ferguson, 25 U. Can. Q. B. 270, and Wallbridge *v.* Everitt, 22 U. Can. C. P. 28, the effect of prior restrictive words was held to be determined by the intention collected from the whole deed, and in those cases the covenants to which such words were not attached were held unrestricted.

[1] Crossfield *v.* Morrison, 7 C. B. 286.

[2] And so by analogy in Reed *v.* Hatch, 55 N. H. 327, where in a deed for a mill property after the covenant of warranty were the words "provided said mill is kept for the manufacture of lumber, or as long as it is kept for said use," it was held that the proviso applied to the grant, not to the covenant only. In Belcher *v.* Sikes, 8 Barn. & Cress. 185, on the dissolution of a copartnership for supplying the navy with provisions, it was covenanted by one of the partners, that notwithstanding any act done by him it should be lawful for the other partner to receive the money, debts, and premises thereby assigned, without any let, suit, interruption, or denial of the assignor, his executors or administrators, or any person claiming under him or them, and it was held that

§ 291. Second. But where the first covenant is general, a subsequent limited covenant will not restrain the generality of the preceding covenant, unless an express intention to do so appear, or unless the covenants be inconsistent.[1]

In an early case,[2] on an assignment of a lease, the vendor covenanted that it was a valid lease, and should so endure during the remainder of the term, which was followed by limited covenants for quiet enjoyment and against incumbrances; and it was held that the generality of the preceding covenant was not restrained by the latter.[3] So where,[4] on an assignment of certain shares in a patent for paper-making, there was a covenant of full power and authority to make the assignment, and that the covenantor had not done anything to forfeit any right or authority he ever had, etc., Lord Alvanley held that unless it irresistibly appeared that the parties could not intend to make a general covenant, the court ought not to indulge them in leaving out words which are ordinarily introduced, and by which the real meaning of the parties might be plainly understood; and as the words "notwithstanding any act done by him" were omitted from the first covenant, the omission of these words was of itself decisive, as the attention of

a receipt of money by the executor of the assignor was a breach of the covenant, the words of limitation being inconsistent with the subsequent part of the covenant.

[1] This proposition was approved in Peters *v.* Grubb, 21 Pa. 460 (see the case *supra*, p. 213), as also in Rowe *v.* Heath, 23 Tex. 619, and Morrison *v.* Morrison, 38 Io. 73. In Crum *v.* Loud, 23 Io. 220, the question arising under such covenants was left undecided. The student must not mistake the only printed opinion, which is the dissenting one, for the opinion of the court.

[2] Gainsford *v.* Griffith, 1 Saund. 58.

[3] Lord Eldon said of this case (in Browning *v.* Wright), that the assignor seemed to have said, "I not only covenant for the goodness of my title, but that you shall enjoy under that title, without any interruption from me." In the elaborately reasoned case of Sumner *v.* Williams, 8 Mass. 162, the members of the court differed as to the effect produced by the insertion of a limited covenant against incumbrances between preceding and subsequent unlimited covenants for seisin and of warranty, Parker, J., being of opinion that the limited covenant qualified the others, which might be considered "as limited and restrained in their operation by the whole context of the deed." There were special circumstances connected with these covenants, which might tend to lead to this conclusion. They were made by administrators, and although a majority of the court held them personally liable on their covenants, yet the circumstance of their acting *en autre droit* did certainly, as the learned judge remarked, aid the construction. It was, however, said by Sewall, J., that "covenants respecting the seisin, the power to convey, and the general title, made without restriction, may well consist with a restrictive covenant against incumbrances. And taken together, the several covenants recited stand unconnected in sense and expression, and uncontrolled the one by the other."

[4] Hesse *v.* Stevenson, 3 Bos. & Pull. 565.

the purchaser was not called by any words to the intent of the vendor to confine his covenant to his own acts,[1] and it was well added, that the rule of construction in Browning *v.* Wright had never been carried to such a length as to decide that because some clauses are introduced into a deed which do not add to the security provided by the other clauses, the security so provided is to be restrained.[2]

But in an early case in New York, the vendor covenanted that he was well seised of the premises, and had good right to convey them, to which was added a covenant of warranty "against all claims and demands whatever, *except the lord of the soil*," and it was held that these words expressly declared to the grantee that there was a lord of the soil, and it could not be supposed that the grantor could, in one line, covenant absolutely that he was seised, when he admitted, and it was so understood by both parties, that there was a lord of the soil, who, in the next covenant, was excepted from its operation. The exception was, it was said, manifestly intended to apply to both covenants.[3] So in a case in the

[1] It should, however, be noticed of this case, that there are many reasons why the covenants in the assignment of such a patent should be interpreted with the greatest strictness against the party making them. In England, it seems that general covenants for title are usually required in such assignments. 2 Davidson's Conv. (2d ed.) 455. See *supra*, Ch. II.

[2] In Atty.-Gen. *v.* Purmort, 5 Paige, (N.Y.) 620, there was a general warranty to the grantee and his heirs, "and if he or they shall be legally evicted, to pay the value of the premises with the improvements at the time of such eviction, with the legal and necessary charges of defending the same, *if by reason of any incumbrance of the said party of the first part, his heirs or assigns.*" This deed was delivered as a general warranty deed, the clause in italics being inserted in the handwriting of the grantor, who was an attorney, at the end of the covenants, which were printed; and it was urged that the grantor intended by this clause to restrain and qualify all his prior covenants for title (as was also the case in Crum *v.* Loud, 23 Io. 219), and therefore fraudulently delivered the deed as containing a general warranty. But Walworth, Ch., said, "I think it very evident from the whole transaction that the written clause was inserted in the deed by him for a different and much more honest purpose. The printed blank used upon that occasion was from a form which I had myself prepared and had printed, to be used only in special cases. And the concluding clause, making the grantor liable in case of eviction for the full value of the premises, with the improvements at the time of such eviction, without reference to the amount of the consideration expressed in the conveyance, was not usually inserted in full covenant warranty deeds. The defendant had a right to the written qualification of this extraordinary and unusual covenant to the case of an eviction, on account of an incumbrance created by himself. I am satisfied, therefore, that he inserted the written clause for this purpose only, and not to qualify or alter the legal effect of the other covenants in the conveyance."

[3] Cole *v.* Hawes, 2 Johns. Cas. 203. It was so held in the recent case of Dunn *v.* Dunn, 3 Col. 510, where the words were "except as against the United States."

In Phelps *v.* Decker, 10 Mass. 267 (cited

Exchequer,[1] the first two covenants, viz. for good title and for right to convey, were unlimited; the last two, for quiet enjoyment and against incumbrances, were limited to the acts of the covenantor, but the court held that it was the intention of the covenantors by the first two covenants to bind themselves that the vendees should have a good estate *so far as rested in them*, and therefore considered them as qualified by the subsequent covenants. But soon after, this case was overruled by one in the King's Bench,[2] where the vendor selling by virtue of a power covenanted that it was in full force and that he had good right to convey, which was followed by limited covenants against incumbrances, for quiet enjoyment, and for further assurance, and the court said that looking at all the cases cited for the defendants, there was one only [3] where a general covenant had been held to be qualified in the manner here contended for, unless there appeared something to connect it with a restrictive covenant, or unless there were words in the covenant itself amounting to a qualification; and having considered that case again since the argument, the court could not feel itself bound by its authority, and therefore concluded that the covenant declared upon, being unqualified in itself and unconnected with any words in the qualified covenant, must in a court of law be considered as an absolute covenant for title.[4]

supra, p. 68, n. 3, as to another point), after the description of the premises, it was said, "The above is warranted from all claims and demands whatsoever, as far as the Connecticut and Susquehanna Company Purchase extends, and is regularly made;" then followed general covenants for seisin, of right to convey, for quiet enjoyment, and of warranty. The defendant pleaded that all the estate of the Susquehanna Company came to and was vested in the plaintiff, which, on demurrer, was held bad, the court being clearly of the opinion that the general covenants were not restrained by the alleged limitation as to the title of the Susquehanna Company.

[1] Milner *v.* Horton, M'Clel. 647.

[2] Smith *v.* Compton, 3 Barn. & Ad. 189.

[3] Milner *v.* Horton, *ubi supra*.

[4] So in an early case in Pennsylvania, Bender *v.* Fromberger, 4 Dall. 440, which was decided three years after Hesse *v.* Stevenson, though without referring to that case, Tilghman, C. J., thus introduced the statement of the covenants contained in the deed: "I subscribe to the principle laid down by Lord Eldon in the case of Browning *v.* Wright, cited on the part of the defendant, that where it manifestly appears from a consideration of every part of the deed that no more than a special warranty was intended, it shall be so construed, although the deed in one part contains words of covenant of more general import. To this rule I add the two following ones: that in construing a deed, no part shall be rejected unless it produces contradiction or absurdity, and that in doubtful cases a deed is to be construed in favor of the grantee. . . . [The remarks which followed as to the covenants implied from the words "grant, bargain, and sell" are no longer law (*supra*, p. 457).] I do not conceive it is possible for a man of

So in a case in Massachusetts, a vendor covenanted that he was lawfully seised in fee of the premises, and had good right to sell and convey them to the plaintiff, and that as to a certain portion thereof extending westward from a given boundary, the same was free of all incumbrances, and he would warrant and defend it against the lawful claims of all persons.[1] "It was contended by the defendant's counsel," said the court, "that the covenant of seisin was to be considered as limited in the same manner as the other covenants. If the parties had so intended, they would have so expressed their intention in the restricting clause. We cannot add to the language, unless it can be made clearly to appear that a word was omitted by mere mistake. Nothing of this kind appears in any part of the deed, but quite to the contrary; for if the intention of the parties was to limit all the covenants alike, it would undoubtedly have been so expressed. There was a good reason, probably, why a distinction was made between the covenant of seisin and the other covenant, for if the plaintiff should have been evicted by a paramount title, it would have been a breach of the covenant of warranty and against incumbrances, a paramount title being an incumbrance. But such a title does not affect the covenant of seisin.[2] Most decidedly, therefore, the construction of the deed contended for by defendant's counsel on this point cannot be maintained." [3]

§ 292. Third. As on the one hand a subsequent limited covenant does not restrain a preceding general covenant, so on the

common sense to declare that he engages that he had a perfect estate in fee simple, and had a good right to convey such perfect estate, without intending to warrant to a greater extent than against himself and his heirs. These are no technical expressions, but such as every able man understands, which is not the case with a special warranty. To a common man it is not very intelligible that there should ever be occasion to warrant and defend against himself and all persons claiming under him, for it is very natural to suppose that when a man has used words sufficient to convey his estate to a third person, he has necessarily done enough to bar himself and all persons claiming under him, without calling in the aid of a special warranty. In short, the insertion of the clause of special warranty is generally the act of scriveners; but I presume that no scrivener could be so stupid as to insert a covenant that 'the grantor was seised of an indefeasible estate in fee,' unless he had been told by the parties that a general warranty was intended. I am therefore of opinion that the special warranty in this deed has not the effect of controlling the precedent general covenant."

[1] Cornell *v.* Jackson, 3 Cush. (Mass.) 506.

[2] Referring to the peculiar view taken of this covenant in some of the New England States, *supra*, § 42 *et seq.*

[3] See also Rigby *v.* Great West. Rail. Co., 4 Exch. 220.

other hand a preceding general covenant will not enlarge a subsequent limited covenant.

In an early case,[1] one seised of an estate under grant from the Crown in conveying it to a purchaser recited the letters patent and the conveyances from thence down to himself, and covenanted that he was seised in fee, that he had good power to convey, and that there was no reversion in the crown notwithstanding any act done by him. The court below held that these last words restrained the generality of the first two covenants; but this was reversed on writ of error,[2] and it was held that the restrictive words did not extend to the preceding covenants. "And the only ground on which I supposed the court to have proceeded," said Lord Eldon, in speaking of the case in Browning *v.* Wright, "is this, that they considered it to have been the intention of the parties that the vendor should enter into an absolute covenant for his seisin in fee in all cases but one, namely, that he should not be liable on the objection of a reversion existing in the Crown,[3] unless that reversion appeared to have been vested in the Crown by his own acts."

§ 293. Fourth. Where the covenants are of divers natures, and concern different things, restrictive words added to one shall not control the generality of others, though they all relate to the same land.

Thus in Crayford *v.* Crayford,[4] where a vendor covenanted that he was seised in fee, notwithstanding any act done by him or his ancestors, that there was no reversion in the crown, that the estate was of a certain annual value, and that the plaintiff should enjoy the same discharged from all incumbrances made by him or his ancestors, it was held that "the covenant for value was an absolute and distinct covenant, and had no dependence upon the first part of the covenant;" and in a subsequent similar case the construction was the same.[5]

[1] Trenchard *v.* Hoskins, Winch, 91; s. c. Litt. 62, 65, 203.

[2] See 1 Sid. 328, and 1 Saund. 60.

[3] "In grants of land by the Crown," says Sugden, "it is usual to reserve a reversion, which the grantee cannot bar." 2 Sugd. on Vend. (10th ed.) 535.

[4] Cro. Car. 106.

[5] Hughes *v.* Bennet, Cro. Car. 495; s. c. W. Jones, 403. In Rich *v.* Rich, Cro. Eliz. 43, Lord Rich covenanted that certain lands conveyed to Lady Rich, the plaintiff, for her jointure, were of the yearly value of £1,000, and should so continue notwithstanding any act done or to be done by him; "and the action was brought for that the lands were not of the yearly value of £1,000, but it was adjudged against the

§ 294. The comparative absence of American authority upon this subject which must have been observed, is owing not only to the fact that the niceties of English conveyancing have been but little adopted in this country, but, as has been seen, in many of our States some or all of the covenants for title are implied by statute from the use of the words of grant, and all the covenants, when thus implied, have generally been cast in the same mould, so that there is no distinction between them as to one being more general or more limited than another.

§ 295. Covenants for title may also obviously be limited and restrained by any express agreement contained in the deed. In an old case, where the covenants were general, the defendant pleaded that it was further agreed in the same indenture that all the covenants therein should not extend further than to acts done by the vendor and his heirs, and although the agreement was "a remote one in the end of the deed and far distant from the other covenants," it was nevertheless held to qualify them.[1] So where the deed contained a general covenant of warranty, and there was a contemporaneous sealed agreement that if the land should be recovered by any one claiming the same within three years thereafter the purchaser was to recover back the amount he had paid the vendor, the court held that the bond was merely a limitation of the amount of damages to be recovered by the vendee in case of eviction within the three years,[2] and that after the expiration of that time the general warranty was in force for the full amount which might be recoverable at law.[3]

So, of course, certain defects of title or incumbrances may be excepted from the operation of the covenants, or some of them,[4]

plaintiff; for the words 'notwithstanding any act' extend as well to the time of the covenant made as to the time future, and though they were not then of that value, the covenant was not broken, except some act done by him was the cause of it." The distinction between these cases is sufficiently obvious. So also, in the somewhat recent case of Kean *v.* Strong, 9 Irish L. 74, a covenant for renewal was held to be distinct from and unqualified by the covenant for quiet enjoyment.

[1] Brown *v.* Brown, 1 Lev. 57; s. c. 1 Keb. 234.

[2] That is to say, "in that event there should be no claim upon the warrantor for more than the purchase money without interest, whereas the general warranty would hold him liable for the purchase money and interest."

[3] Black *v.* Barton, 13 Tex. 82. Obviously, however, whatever might be the effect of such an instrument as between the parties, it would not affect a purchaser of the land without notice. *Supra*, §§ 88, 223.

[4] *Supra*, § 88; Gale *v.* Edwards, 52 Me. 363; Estabrook *v.* Smith, 6 Gray, (Mass.) 578. Neither, conversely, can a limited covenant of warranty be enlarged

as has been already shown, but such exception must appear on the face of the deed and cannot at the trial be made out by parol.[1]

§ 296. But while this is so, the familiar principles which govern courts of equity in the reformation of instruments on the ground of fraud and mistake apply of course to the covenants for title. Thus in the early case of Coldcot *v.* Hill,[2] the plaintiff, having purchased church lands in fee under the title of Cromwell, sold them to the defendant's testator with general covenants for the title, but upon the Restoration the estate was avoided, and the defendant, in an action on the covenants, recovered back his purchase money, upon which the vendor filed a bill to enjoin the collection of the judgment, "which did suggest a surprise upon the plaintiff in getting him into that covenant, and that it was declared by Dr. Coldcot, when he sealed, and the defendant's testator, that it was intended Dr. Coldcot should not undertake any further than against himself;" which appearing upon proof of this,[3] the purchaser was decreed to enter satisfaction on the judgment and pay costs.[4]

A few years after,[5] a bill was filed to enjoin a judgment obtained upon a general covenant that the grantor had lawful power to convey, "which being contrary to the true intent and meaning of the said parties, and it appearing so in the conveyance where the rest of the covenants are restrained to the acts done by the

to a general covenant by parol evidence. Buckner *v.* Street, 5 McCr. (C. C. U. S.) 59

[1] *Supra*, § 88; Raymond *v.* Raymond, 10 Cush. (Mass.) 134.

[2] 1 Cas. in Ch. 15; s. c. Freem. 173; and see this case *infra*, Ch. XV.

[3] "Upon the hearing, it was proved that the matter of the covenant upon which the judgment was had against the plaintiff was controverted in the paper draft and put out by the plaintiff's counsel, and in again by the defendant's counsel, with the alteration only that whereas the covenant was that the plaintiff was lawfully seised, etc., the plaintiff's counsel put out (lawfully), which signified nothing; for to covenant one is seised is intended lawfully. But some proof being that it was declared upon sealing that the plaintiff should undertake for his own act only, it was decreed that the defendant should acknowledge satisfaction on the judgment and pay costs." The report in Freeman says, "The court, upon consideration that the covenant for enjoyment was intended only against acts done by the plaintiff or his trustees, and that the agreement to that effect was fully proved, declared the plaintiff ought to be relieved against the covenants inserted in the deed, and the judgment obtained thereon; and did therefore decree the defendants to acknowledge satisfaction on the said judgment, and to release all errors, and that no more actions should be brought on the said covenant, and for that end awarded an injunction against the defendants."

[4] The report also says that a like case to this, between Farrar and Farrer, was heard and decreed after the same manner about six months before.

[5] Fielder *v.* Studley, Rep. temp. Finch, 90.

plaintiff and all claiming under him, and that the covenants ought to be so restrained, especially since the purchaser knew the plaintiff's title, and that he sold him only such estate as he had in the premises,[1] . . . the court decreed that the general words in this covenant ought not to oblige the plaintiff, being contradicted by all the subsequent covenants, and the plaintiff selling only such an estate which he had," and the defendant was therefore enjoined from proceeding upon his judgment.[2] And the same doctrine is fully recognized and applied on this side of the Atlantic.[3]

§ 297. Nothing is better settled as a general rule in the construction of deeds, than that in case of discrepancy in the description between the distances and the boundaries the former are controlled by the latter, on the ground that the lesser must yield to the greater certainty.[4] And where land is conveyed by a particular description and with an enumeration of the quantity of acres, the latter is held to be matter of description merely, and cannot be deemed an implied covenant for quantity.[5]

As therefore the descriptive boundaries control the quantity, it

[1] "And never took any advantage or questioned the plaintiff in any of the covenants in the deed, but continued in the possession, and received the profits thereof for ten years and upwards, and after the Restoration he or his son took a new lease of the Dean and Chapter of Sarum for three lives, and had a considerable abatement of the fine, in respect of the purchase made by the plaintiff."

[2] "This last case," says Sugden, "was quoted in a case in the Common Pleas, before Lord Eldon (Browning *v.* Wright, *supra*, § 289), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent and the consequent legal effect of the instrument could only be collected from the instrument itself, and not from anything *dehors*. In a still later case in the same court, Hesse *v.* Stevenson, *supra*, p. 487, n. 4, Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake in the same manner as applications are made to that court to correct marriage articles, where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence that the vendor sold only such estate as he had, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Coldcot and Hill and is still clearly admissible." 1 Sugd. on Vend. (10th ed.) 262.

[3] As, for example, in Rufner *v.* M'Connel, 14 Ill. 168; Crum *v.* Loud, 23 Io. 219; Metcalf *v.* Putnam, 9 Allen, (Mass.) 99; Stanley *v.* Goodrich, 18 Wis. 505.

[4] 3 Washburn on Real Prop. 631; Kruse *v.* Scripps, 11 Ill. 103; Powell *v.* Clark, 5 Mass. 355; Jackson *v.* Defendorf, 1 Caines, (N. Y.) 493; Jackson *v.* Barringer, 15 Johns. (N. Y.) 471; Jackson *v.* M'Connell, 19 Wend. (N. Y.) 175; Smith *v.* Evans, 6 Binn. (Pa.) 107; Petts *v.* Gaw, 15 Pa. 222.

[5] Perkins *v.* Webster, 2 N. H. 287; Large *v.* Penn, 6 Serg. & Rawle, (Pa.) 488; Whitehill *v.* Gotwalt, 3 Pa. (old Pa., not Pa. St.) 327, overruling Christine *v.* Whitehill, 16 Serg. & Rawle, (Pa.) 112.

has been repeatedly held that the covenants for title apply to the premises contained within those boundaries, and not to any enumeration of acres. Thus in an early case in Connecticut,[1] where the defendant was sued on a covenant for seisin contained in a conveyance of one hundred and ten acres of land with certain boundaries, it appeared that the title was good to all the land within the boundaries, but that there were only ninety acres, and the court held that the deed granted nothing but the lands lying within the bounds described and gave judgment for the defendant; and in a numerous class of cases the same principle has been recognized.[2] Of course, however, this rule will not apply where on the face of the instrument it appears that the covenants were directly intended to assure a particular quantity to the purchaser.[3]

§ 298. This class of cases obviously proceeds upon the ground that the covenants for title apply to what is conceived to be the subject matter of the conveyance according to the intention of the parties,[4] and it has been carried so far as to have been held in many cases that where the conveyance is of a limited estate or interest, general covenants for title will be restrained by the extent of that interest.[5] Thus in an old case,[6] where the deed conveyed the third part of certain premises for the life of the grantor, with covenants for perfecting the conveyance by further assurance and for well enjoying that which was conveyed, it was held that the covenants could not be taken to assure a greater estate than the third part thus conveyed, during the life of the

[1] Snow *v.* Chapman, 1 Root, 528.

[2] Belden *v.* Seymour, 8 Conn. 19 (Bissell, J., dissenting); Elliott *v.* Weed, 44 id. 19; Davis *v.* Atkins, 9 Cush. (Mass.) 13; Ferguson *v.* Dent, 8 Mo. 667; Smith *v.* Negbauer, 13 Vroom, (N. J.) 305; Mann *v.* Pearson, 2 Johns. (N. Y.) 41; Whallon *v.* Kauffman, 19 id. 101; Roat *v.* Puff, 3 Barb. S. C. (N. Y.) 353 (where most of the cases are collected); Rickets *v.* Dickens, 1 Murph. (N. C.) 343; Huntly *v.* Waddell, 12 Ired. (N. C.) 33; Bauskett *v.* Jones, 2 Spears, (S. C.) 68; Lorick *v.* Hawkins, 1 Rich. (S. C.) 417; Tucker *v.* Cocke, 2 Rand. (Va.) 51 (overruling Quesnell *v.* Woodlief, 2 Hen. & Munf. 173).

[3] Pecare *v.* Chouteau, 13 Mo. 527; Morris *v.* Owens, 3 Strobh. (S. C.) 199; Steiner *v.* Baughman, 12 Pa. 106.

[4] Long Island R. R. *v.* Conklin, 32 Barb. (N. Y.) 388; Kilmer *v.* Wilson, 49 id. 88.

[5] One instance in which general covenants for title are limited by the estate conveyed has already been noticed (*supra*, § 250), viz. that in case of a reconveyance to the vendor the purchaser's general covenants are nevertheless limited to defects or incumbrances erected by himself, and not to those of the vendor or any one prior to him in the chain of title. Kellogg *v.* Wood, 4 Paige, (N. Y.) 614; Cole *v.* Lee, 30 Me. 392.

[6] Clanrickard *v.* Sidney, Hob. 273; *supra*, p. 475, n. 3.

grantor.[1] So in Ireland, where the defendant purported to convey all the estate and interest which he had under a certain deed, it was held that his covenant that he had good right to make conveyance under that deed was not an absolute covenant that he had a freehold estate, but only that he had power to convey such an estate as he took under the deed.[2] So in an early case in New York,[3] where a lessee assigned the lease "in as ample a manner to all intents and purposes as I might or could hold or enjoy the same, and I covenant that I have good and lawful right to bargain and transfer the said premises, as is above written, and that the same are clear of all arrearages of rent and other incumbrances," it was held that the words "as is above written" qualified the covenants, and that it could not be supposed that the assignor meant to warrant his landlord's title.[4] So in a case in Massachusetts, where the conveyance was of all the grantor's "right, title, and interest in and to the undivided estate devised," it was held that a general warranty which the deed contained was limited to be an assurance of that particular estate only, and therefore could not be held to operate by way of estoppel in passing an after-acquired estate.[5] So in a subsequent case in the

[1] "Now who sees not," said Lord Hobart, "that the office of these covenants, when they follow in express grant, is not to give anything, but to assist, further, and support, being as a wall or monument about it, and therefore cannot be understood to exceed that whereunto they are said to be but handmaids, according to the rule of the Great Master: the servant cannot be above the master. And because it may appear how absurd it will be to take these covenants as if they stood alone in that respect to the whole content and intent of the deed." See also *supra*, § 250.

[2] Delmer *v.* M'Cabe, 14 Irish L. (N. S.) 377.

[3] Knickerbacker *v.* Killmore, 9 Johns. 106.

[4] There may, however, be reasons why, in the assignment of a lease, the covenants should be construed differently from those in the conveyance of a freehold. See *supra*, § 26, also p. 477; *infra*, p. 500.

[5] Blanchard *v.* Brooks, 12 Pick. (Mass.) 67. See the language of the court, cited *supra*, p. 371, n. 1. So in Grimes *v.* Redmon, 14 B. Mon. (Ky.) 236, where there was an exchange of land, the court said, "Although it is true that the deed of Bates contains a warranty purporting to bind his heirs, and which, to the extent of the value of any heritage descended from him to them, would bar them from recovering merely on the ground that a better title than that which passed by his deed had descended to them from another ancestor, yet as this deed shows explicitly that it is made in consequence and in consideration of an exchange of lands, of which it is a part, and in fact the consummation, as it is not only the implied law of such a transaction, but upon comparison of the reciprocal deeds by which it was consummated, and which must be taken together as one transaction, it is found to be the express law of this particular transaction that if either party shall lose by a better claim the land which he has received in exchange, he becomes thereby immediately entitled to the land which he has given in exchange; and as by the implied law of

same State, the conveyance was of "all my right, title, and interest in and to Tiffany's Ferry, and the boat which I built the last season, and now use in carrying on the ferry, and all the estate, land, and buildings standing thereon, situate and being in Northfield, as the same is now occupied and improved by me, and I do covenant that I am the lawful owner and possessor of the before-granted premises, and have in me good right, etc. to give, grant, and confirm the same," followed by a general warranty of "the before-granted premises," the grantor in this conveyance, being offered as a witness in support of the title in favor of an alience, was objected to on the ground of his liability on these covenants, but the court held that the covenant was restrained by the previous context of the deed, and consequently that the witness was competent.[1] So in a more recent case, where the grant was of

an exchange the party thus losing may immediately enter upon the land given in exchange for it, while by the express stipulations of these parties he who has not lost is bound to restore and reconvey the land which he has received to the party who has lost, quantity for quantity, we perceive at once that the general warranty contained in each deed is qualified and restricted, both by the nature of the transaction as an exchange and by the express stipulation of the other deed, so as to make the lawful eviction of either party from the land received by him an exception to the general terms of the warranty, and thus to free him in such case from the estoppel which might otherwise prevent him from reclaiming the land which he had conveyed with warranty." In Hurd *v.* Cushing, 7 Pick. (Mass.) 169, where a tenant for life conveyed "all his right, title, and interest" in the land with a covenant that he was seised in fee, it was held that only the life estate passed, for the covenant could not enlarge the estate. (Seymor's case, 10 Rep. 97, and see *supra*, p. 391.) So where, in Corbin *v.* Healy, 20 Pick. (Mass.) 514, one granted land to his daughter "and the heirs of her body, to have and hold the same to her and her heirs forever," and covenanted to warrant and defend the same to her and her heirs, it was held that neither the *habendum* nor the warranty could make the estate other than an estate tail.

[1] Allen *v.* Holton, 20 Pick. (Mass.) 463. "The objection would be well maintained," said Wilde, J., who delivered the opinion, "if a literal construction of the covenant of warranty could be allowed without reference to the other parts of the deed. But every deed is to be construed according to the intention of the parties, as manifested by the entire instrument, although it may not comport with the language of a particular part of it. Thus a recital or a preamble in a deed may qualify the generality of the words of a covenant or other parts of a deed. 4 Cruise's Dig. tit. 32, Deed, c. 23, § 8. The case of Moore *v.* Magrath, Cowp. 9, is a strong case to show to what extent a court may go in qualifying and even in rejecting a particular clause in a deed, in order to effectuate the intention of the parties. In that case, the lands intended to be granted by a deed of settlement were particularly named in the preamble, and were afterwards minutely described in the premises, and then followed a sweeping clause purporting to convey 'all other the donor's land, tenements, and hereditaments in Ireland.' And the court held that nothing passed by this sweeping clause; the court being of opinion, from the words of the preamble, that the donor did not intend to include his paternal estate (which was situate in a different county from those in which the lands intended to be conveyed were situate), and that it was more than

"all my right, title, and interest in and to that parcel of real estate situate in Green Street, and is bounded," etc., followed by unlimited covenants for seisin, good right to convey, against incumbrances, and of warranty, it was held that these covenants were limited merely to the right and title of the grantor, whatever that might be;[1] and the law has been so held in many similar cases.[2]

§ 299. It may however be observed of these cases, that inasmuch as all conveyances taking effect under the statute of Uses

probable that the drawer by mistake omitted some words in the sweeping clause. Whatever may be thought of the intention of the parties in that case, we think the intention as to the extent of the grant in the present case is sufficiently plain. The grantor conveys his own title only, and all the subsequent covenants have reference to the grant, and are qualified and limited by it. That this was the intention of the parties cannot, we think, be reasonably doubted, and the words of the covenants are to be so construed as to effectuate that intention."

So where the obvious meaning of the covenants renders it necessary, courts will construe one word to mean another, as is constantly done in wills, as where, in Sanders *v.* Betts, 7 Wend. (N. Y.) 287, the party of the first part in a deed covenanted to warrant and defend the premises from all persons claiming "by, from, or under him, the said party of the *second* part," the plaintiff urged that all these words must be rejected as being repugnant to the preceding matter. But the court held that *second* had been inadvertently used instead of *first*, and construed the covenant as being a limited one only.

[1] Sweet *v.* Brown, 12 Met. (Mass.) 175.

[2] Ballard *v.* Child, 46 Me. 153; Bates *v.* Foster, 59 id. 158; Stockwell *v.* Couillard, 129 Mass. 231; Young *v.* Clippinger, 14 Kans. 148; McNear *v.* McComber, 18 Io. 14. In the last case, some of the covenants were written and some in printed form, and it held that the former controlled the latter, the Code in Iowa providing that "when an instrument consists partly of written and partly of printed form, the former controls the latter when the two are inconsistent." Rev. Code of 1860, c. 159, § 3993; Code of 1873 (ed. of 1880), § 3651. In Sweet *v.* Brown, the court said: "The warranty is of the premises which were granted and conveyed by the deed. But that was 'all my right, title, and interest in and to that parcel of real estate situate,' etc. It was not a grant of certain land, in general terms, but of his title and interest in such land, and this particularly and fully expressed. The warranty must be taken in a limited sense. It must be restricted to his title and interest. . . . Such construction will reconcile all parts of the deed and give effect to each." And the cases of Blanchard *v.* Brooks, 12 Pick. (Mass.) 67, and Allen *v.* Holton, 20 id. 463, *supra*, were then cited and approved. In Lull *v.* Stone, 37 Ill. 228, however, the correctness of these cases was doubted, though the decision itself was based upon another ground.

Wynn *v.* Harman, 5 Grat. (Va.) 157, was a very clear case. The conveyance was of "all claims in and to the Curran place, which was conveyed to Curran by Daniel Harman, senior," and the covenant was that "the said Harman and wife, for themselves and their heirs, the said right as it was invested in Daniel Harman, to the said John and his heirs, against themselves and their heirs, will warrant and defend; it is fully understood, if said title should prove insufficient in law or equity, the said Wyman and heirs is to have no recourse, he knowing the whole circumstance."

The difference in an *executory* contract between an agreement to convey a good title, and such a title as the party has, is well shown by Strong, J., in Herrod *v.* Blackburn, 56 Pa. 105.

transfer no more than the estate of the party, such a course of decision, if too strictly carried out, would in such conveyances restrain all general covenants for title to the acts of the vendor, and thus of course utterly change the nature of such covenants. It is conceived therefore that this class of cases should be limited in their application to those where the intention to convey and receive but a limited estate plainly appears on the face of the deed.[1] And in a case in Massachusetts, where the conveyance was of "the following described water lots," and, appended to the description by metes and bounds, the words "meaning and intending by this deed to convey all my right, title, and interest in and to lots numbered three and six, and my undivided portion of the aforementioned flats," it was held that the general covenants for title which the deed contained were not restricted merely to the interest of the grantor.[2] So in a late case in Vermont, where the grant was of "the following described land in Colchester, all the land which I own by virtue of a deed, being all my right and title to the land comprising fifty acres off of the east of lot No. 75 in said town," it was held that the covenants were not qualified by the grantor's interest.[3] So in a case in Eng-

[1] See Jackson *v.* Hoffman, 9 Cow. (N. Y.) 271. That case decided that where a deed contained a recital of the premises being incumbered by a mortgage, followed by unlimited covenants, the mortgage was excepted from their operation. It was followed in Bricker *v.* Bricker, *supra*, p. 482, n. 3. It must not be forgotten, however, that it is always in the power of the vendor to except the mortgage from the operation of the covenants, as in Potter *v.* Taylor, 6 Verm. 676, where, after a covenant against incumbrances, were inserted the words, "except the amount of a mortgage held by B. K., on which is due about eighteen tons of hay," and it was held that the covenant was broken only as to any excess there might be due over the eighteen tons.

[2] Hubbard *v.* Apthorp, 3 Cush. (Mass.) 419, where Blanchard *v.* Brooks, and Allen *v.* Holton, *supra*, were commented upon. (The decision was quoted at some length in the fourth edition of this treatise, p. 528 *et seq.*) In Whiting *v.* Dewey, 15 Pick. (Mass.) 434, it seems to have been thought that if the words "being all the same lands which the said Benedict Dewey, deceased, lately owned," had been the only words of description used, they would have limited the general covenants which followed; but as the premises were in the grant particularly described by metes and bounds, the description was held not to limit the covenants.

[3] Mills *v.* Catlin, 22 Verm. 98. "Upon the principle that the construction is to be upon the entire deed, and that one part is to help expound another, and that every word if possible is to have effect and none be rejected, and all the parts thereof agree and stand together, we think it must be held to have been the intention of the parties to grant the *land*, and that the *habendum* in the deed is to hold *the land*, and the covenants are, as they import to be, unlimited, and relate to the *land* and insure title to it. But if, after all, we consider the intention of the parties ambiguous, the rule would be interposed that the construction in such case is to be most strongly against the grantor and in favor

land,[1] a testator having a power to lease for three lives demised "as far as in his power lay or he lawfully might or could" part of the premises, covenanting for quiet enjoyment during the same without interruption by himself or his heirs or any one claiming under him. There had, however, been a prior appointment by himself and his father, and after the testator's death the lessee was evicted by the eldest son of the latter, and the master to whom it was referred to determine the liability of his estate under the covenant reported that it was not liable; but this was set aside by the Master of the Rolls who said, "It is urged that the lessee is not entitled to any compensation for her eviction, and that for two reasons: first, because it is clear on the face of the deed itself that the testator did not mean to assert that he was entitled to grant such an interest as he purported to give. This made me inquire whether there was any evidence of the lessee's having notice that the lessor had no title to grant this lease. If she had, a different consideration would arise;[2] and it might then be properly said that she could only take such title as she knew could be granted to her. On the one hand, we know that in practice a lessee is never allowed to look into the lessor's title; and on the other hand, a person granting a term must be taken to

of the grantee, and this to prevent an evasion by the grantor by his use of obscure and equivocal words." Steiner *v.* Baughman, 12 Pa. 106, and Peck *v.* Hensley, 20 Tex. 677, are to the same effect. In Cooke *v.* Fownds, 1 Lev. 40, s. c. 1 Keb. 95, the vendor covenanted that he was seised of a good estate in fee, according to the indenture made to him by W., of whom he had purchased, and pleaded, in an action in which it was assigned for breach that he was not seised of a good estate in fee, that he was seised of as good an estate as W. conveyed to him, this was held bad on demurrer, "for the covenant is absolute, and reference to the conveyance by W. serves only to denote the limitation and quality of the estate, and not the defeasibleness or indefeasibleness of the title." This case was sought to be distinguished in Delmer *v.* McCabe, 14 Irish L. (N. S.) 377, *supra*, p. 496, where the court said: "It does not occur to us that this case has any application to the case before us, in which the statement or recital is not that the party is seised in fee, but that he is seised and possessed; where the contract is not for the purchase of an estate in fee or freehold, but of the estate and interest of the defendant under the deed of 1841, and where the covenant is not that he has power to convey a fee, but to make this conveyance of his estate and interest under the deed of 1841, followed by a covenant for quiet enjoyment against acts by the defendant himself." But this distinction is rather finely drawn.

[1] Calvert *v.* Sebright, 15 Beav. 156, and see this case cited as to another point, *supra*, p. 121.

[2] It is, however, well settled that mere notice of an incumbrance will not except it from the effect of the covenants for title so as to constitute a defence, for if the parties mean so to except it, the intention should be expressed by apt words in the deed. See *supra*, § 88. But to this rule, which is universal as to purchases, there may be exceptions arising in cases of leases. See *supra*, p. 94 *et seq.*

know his own title, and to assert that he has power to grant that which he purports to grant. The words 'as far as he lawfully can' are implied without their being used. A man can only be taken to grant that which he lawfully can; and by such words as these he cannot mean to assert that he is not entitled lawfully to grant such a lease. To induce me to construe these words to be an intimation to the lessee that the lessor is not entitled to do what he professes to do, I should require either some express authority, or some expression of doubt upon the face of the lease that there was a defect as to the title. In the absence of any such authority or expression, I am of opinion that the defect was not disclosed by these words."

CHAPTER XIII.

THE PARTIES BOUND AND BENEFITED BY COVENANTS FOR TITLE.

§ 300. It is proposed here to consider, first, who are bound by covenants for title; that is to say, the liabilities of the covenantor, the heir, the devisee, and the executor or administrator; and secondly, who may take advantage of them, or the rights of the covenantee, the heir, the devisee, the executor or administrator, and the assignee.

§ 301. 1. *Of the Covenantor.* — The liability of a covenantor obviously depends so much on the nature of the covenant, and the circumstance of its breach, that the subject has to a great extent received consideration in preceding chapters.[1]

[1] The liability created by covenants for title is often a material circumstance in determining the rights of parties in the marshalling of assets.

It is a general and familiar principle of equity that where a creditor has a right to elect between two funds, out of either of which he can satisfy his claim, he shall not be permitted so to exercise that right as to disappoint another creditor who has recourse to but one of them. In England, this principle was formerly perhaps most frequently called into operation as between creditors of the real and personal estate of a decedent. But as on this side of the Atlantic lands are, in most of the States as they are now in England, made assets for the payment of all debts whether due by specialty or simple contract, this class of cases is comparatively a small one, and the doctrine is applied in favor of sureties, purchasers, devisees and legatees, etc. It is only as respects purchasers that the subject needs consideration here.

Where a vendor sells land which is covered by an incumbrance for whose payment he is personally liable, and the contract between himself and the purchaser has been that the latter is not to take the land *cum onere*, it is sufficiently obvious that the purchaser is not only entitled to an indemnity upon payment of the incumbrance by him, but also to a substitution to all the rights of the holder of the incumbrance; and if the incumbrance bind other land of the vendor, the purchaser should, of course, not only be subrogated to such rights as are personal to the vendor, but also to that of subjecting that land to payment of the incumbrance. Thus in Eddy *v.* Traver, 6 Paige, (N. Y.) 521, where one of four heirs sold to the complainant his undivided fourth part of his ancestor's estate with a covenant of warranty, which part was afterwards sold by the surrogate for payment of the debts of the decedent, it was held that the complainant had an equitable lien upon the unsold portion of the estate, and had a right to come in upon the fund raised by the sale of that portion under proceedings in partition. As this right on the part of the purchaser depends, however, wholly on the nature of the contract between his vendor and himself, the presence of covenants for title in the conveyance to him is deemed a material circumstance as evidence of this. Thus in Averall *v.* Wade,

§ 302. Whenever the action of covenant is founded on privity of *contract*, it is of course transitory, and the covenantor is liable to suit wherever process may be served upon him. But whenever founded on privity of *estate*, as for example where the plaintiff, as assignee of the land, sues upon a covenant which runs with it, the action is of course local, and cannot be sustained unless the land be within the jurisdiction of the court in which the action is brought. This has long been settled,[1] and in a rather late case

Lloyd & Goold (temp. Sugd.), 259, Sugden said: "A man seised of estates A and B, both subject to a judgment debt, settles A for valuable consideration without noticing the judgment, the judgment creditor would be compelled to go against estate B, and the persons claiming under the settlement would be entitled to have the settled estate exonerated, at the expense of the unsettled estate; the judgment binds both, and where there is a settlement of part of an estate as if free from incumbrance, equity will throw the whole on the unsettled part which still belongs to the original owner. Here there is a covenant that the estate is free from incumbrances; assuming that there was no such covenant, but a mere declaration that the estate was free from incumbrances, there can be no doubt that that declaration would throw the incumbrance on the unsettled estates." In this case it will be observed that the conveyance was for a valuable consideration and contained a covenant against incumbrances; where, however, the conveyance is voluntary and contains no other covenant than that for further assurance, the grantee will not be exonerated from the payment of a paramount charge. Ker *v.* Ker, Irish R. 4 Eq. 14; and see *infra*, Ch. XV. In Guion *v.* Knapp, 6 Paige, (N. Y.) 35, it was said: "If a mortgage is a lien upon two hundred acres of land, and the mortgagor conveys one hundred acres thereof to A., the one hundred acres which remains in the hands of the mortgagor is to be first charged with the payment of the debt, and, if that is not sufficient, the other one hundred acres is next to be resorted to. But if A. has subsequently conveyed one half of his one hundred acres to B. with warranty, the fifty acres remaining in the hands of A. is in equity first chargeable with the payment of the balance of the debt, which cannot be raised by a sale of the one hundred acres that still belong to the mortgagor or his subsequent grantee, before resort can be had to the fifty acres which A. has conveyed with warranty. And if A. conveys his remaining fifty acres to C., either with or without warranty, that portion of the premises is still liable for the balance of the mortgage debt, and must first be sold before a resort can be had to the fifty acres previously conveyed with warranty to B." And this was approved in Cumming *v.* Cumming, 3 Kelly, (Ga.) 460; Haskell *v.* The State, 31 Ark. 91. But the presence of the covenant is, as has been before said, and as appears from the case of Averall *v.* Wade, material only by way of evidence of the original contract. Cooper *v.* Bigly, 13 Mich. 475; McClaskey *v.* O'Brien, 16 W. Va. 791–839; Miller *v.* Winchell, 70 N. Y. 437. And the doctrine is equally susceptible of application in any case where, from other evidence than that afforded by the covenants, it can be seen that the purchaser was to take the land free from the particular incumbrance. Cowden's Estate, 1 Pa. 266; notes to Aldrich *v.* Cooper, 2 Lead. Cases in Equity, where the doctrine of marshalling assets is carefully considered. In Massachusetts, however, it would seem to be considered that the doctrine depends upon the presence of covenants of warranty. Chase *v.* Woodbury, 6 Cush. 148; Bradley *v.* George, 2 Allen, 392; George *v.* Wood, 11 id. 41.

[1] 1 Chitty's Pleading, 270; Mostyn *v.* Fabrigas, Cowp. 161; 1 Smith's Lead. Cas.; Lienow *v.* Ellis, 6 Mass. 331; White *v.* Sanborn, 6 N. H. 220; Birney *v.* Haim, 2 Littell, (Ky.) 262.

in Massachusetts, where the plaintiff sued on a covenant of warranty upon the sale of land in Illinois to one under whom the plaintiff claimed through mesne conveyances, the plaintiff was nonsuited on the ground of want of jurisdiction, although both he and the defendant were residents of Massachusetts, and the former was, it was urged, without remedy unless the court should sustain the action.[1]

Local legislation, however, has in many States altered the rule of the common law, and in a very recent case in Mississippi where a bill had been filed in that State for reimbursement of expenses in extinguishing a paramount title to land in Louisiana which had been conveyed with covenant of warranty to the assignor of the plaintiff, it was suggested by the court that the suit being in equity, "which never was hampered by distinctions of local and transitory causes of action, as were courts of law," the suit might be sustained on that ground alone; but that above and apart from this, the statute, which enumerated the local actions without naming covenant for breach of warranty, was conclusive in favor of the action being transitory.[2]

[1] Clark *v.* Scudder, 6 Gray, 122. It is obvious, moreover, that a judgment once recovered upon one of the covenants for title may be pleaded in bar of any subsequent suit brought upon the same cause of action. Osborne *v.* Atkins, id. 423; and see *supra*, § 189.

[2] Oliver *v.* Loye, 59 Miss. 320 (s. c. 21 Amer. Law Reg. 600, with a note by one of the editors). The court (per Campbell, J.), referring to the fact that originally all actions were local, said: "The courts in England soon freed themselves from the fetters of locality, as to all causes of action of such nature that they might arise anywhere, and by means of falsehood, politely called fiction, and stated under a *videlicet*, which was an apology for not telling the truth, maintained actions on such causes of action as arose out of the territorial jurisdiction of the courts of England. But such causes of action as could from their nature arise only in one place, and therefore were considered as local and to be redressed only by local actions, did not arise with the frequency of the other class, and did not press upon the courts sufficiently to induce them to include them in the fiction invented to sustain the other class of actions, and as to them the courts continued bound by the idea of the place at which they arose. Therefore it is that courts governed by the common law as to actions and process have felt bound to deny a remedy for causes of action arising abroad which could be redressed only by local action. . . . The only local actions under our statute are ejectment and actions of trespass for injuries to land. They must be brought in the county in which the land lies. All other actions must be brought with reference to the person of the defendant. The common law distinction of local and transitory actions does not exist here. The statute alone governs, and we cannot disregard it, and, because under the common law no remedy could be had by the assignee of a covenantee on a covenant of warranty of title of land lying in another State, deny a remedy in the courts of this State, which does not treat such an action as a local one. The courts which have held such an action not maintainable have done so under the stress of the common law, which they felt so bound them as

The questions hence arising are or may be complicated either by the interpretation of the respective local statutes on the subject itself, or by such statutes as have, in England and elsewhere, been lately passed, more or less abolishing the distinction between law and equity. The subject is too extensive to be here considered at length.

§ 303. As a general rule, the liability of a covenantor will of course not be discharged by his bankruptcy, with respect to such

to constrain them to do what reason revolted at."

The note of the editor (presumably Hon. Eli S. Hammond of Memphis) adds: "The statement of facts in the principal case does not disclose whether it is one maintainable in a court of equity by reason of its jurisdiction to decree specific performance, reformation or rescission, or an injunction, with powers extended to decree damages by legislation similar to Lord Cairns's Act, 21 & 22 Vict. c. 27 [see *infra*, Ch. XV.], or whether the jurisdiction was acquired by State statutes enlarging the jurisdiction of courts of equity. Without such legislation it might not be maintained, irrespective of any question of the differences between local and transitory actions, as there would be an adequate remedy at law for the damages sued for, and it is probable a demurrer for that cause would have been sustained. Rawle, Cov. (4th ed.) 648; 2 Danl. Ch. Pr. (5th ed.) 1081. The statutory modification of the common law distinctions between local and transitory actions referred to in the principal case will probably be found in most, if not all the States having codes of practice. These generally direct when, how, and where actions may be brought, with almost sole reference to the residence or place where the defendant is found; and in directing what actions shall be brought in the county where the land lay they confine the restriction, as in the Mississippi statute, to ejectment and trespasses on the land. But now and then we come across some old common law draftsman whose statute requires 'suits of a local nature' to be brought within defined territorial limits. U. S. Rev. Stat. §§ 740, 741, 742, 744. The denial of all remedy in such cases, that sometimes results where the defendant cannot be found in the particular district to which the plaintiff is confined, is obviated by these Federal statutes, if he resides in the same *State*, by sending the writ to that district in which he does reside. Otherwise, these statutes would seem to impose all the old-fashioned 'fetters of locality,' as Mr. Justice Campbell calls them, unless we are to interpret the phrase 'suits of a local nature' according to the law of the State in which the suit is brought, and not according to the common law. It might be interesting to note whether the principal case could have received the same intelligent judgment if it had been brought in a Federal court or removed thereto — aside from the manifest difficulty of any jurisdiction of a Federal court of equity over it — which had its jurisdiction so restricted; and if not, would we not have the common law predicament, under some circumstances, of leaving the plaintiff practically without remedy? These questions are more easily asked than answered by any adjudications to be found affording a solution. And the opinion suggests with silent force the perplexities that lie within these words, 'suits of a local nature,' remarkably dormant though they be, for the reason, perhaps, that except in ejectment where we get along without any defendant but the actual occupier, this class of suits is rare in all courts." The note, which is too long to be given in full, is an able and interesting one (as is the decision on which it comments) and closes with a cloud of authorities which may be useful to the student in his investigations. And every one will in this connection remember the question of national interest, if not importance, which arose in the case of Guiteau's murder of President Garfield.

covenants as were not broken at that time, inasmuch as, upon general principles, a creditor who has no present debt or claim to prove in bankruptcy should not be deprived of future recovery against his debtor. But whether damages arising from the breach of the covenants for title are so provable naturally depends upon the words of the respective statutes of bankruptcy. In England, before the statute of 1861, bankruptcy was no defence to an action for breach of the covenants for title happening before the bankruptcy, the demand not being considered a liquidated debt,[1] but under that statute,[2] damages might be assessed upon any demand arising upon contract in the nature of unliquidated damages.[3] The same provision is found in the later statutes of 1869[4] and 1883,[5] and their sum is, first, that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust shall not be provable in bankruptcy; secondly, that save as aforesaid all debts and liabilities, present or future, certain or contingent, to which the debtor was subject, shall be deemed to be debts provable; and thirdly, that the word "liability" includes any obligation or possibility of such to pay money on the breach of any express or implied covenant, contract, etc., whether the breach occur before the discharge or not.

The United States statute of 1841, as also that of 1867, were less precise, and merely allowed "uncertain and contingent demands" to be proved in bankruptcy, and the decisions have not been uniform as to the effect of bankruptcy upon demands arising under covenants for title. Of course, where the final breach has occurred before the bankruptcy, the latter may be pleaded as a bar,[6] for the ultimate damage has been sustained. But where

[1] Hammond *v.* Toulmin, 7 Term, 612 (where the defendant sold a ship and covenanted that he had full power to sell the same free of all incumbrances); and see the notes to Mills *v.* Auriol, 1 Smith's Lead. Cas. Robinson *v.* Ommanney, L. R. 21 Ch. Div. 780, 23 id. 285, was decided under the Bankruptcy Act of 1849.

[2] 24 & 25 Vict. c. 134.

[3] It was, however, held that the act only applied to cases where the cause of action was complete before the adjudication. *Ex parte* Mendel, 1 DeG. J. & Sm., 330.

[4] 32 & 33 Vict. c. 71, L. R. 4 Stat. 398.

[5] 46 & 47 Vict. c. 52, L. R. 19 Stat. 285.

[6] Williams *v.* Harkins, 55 Ga. 172. And where in Parker *v.* Bradford, 45 Io. 311, there was a prior incumbrance which the grantor agreed to pay but was discharged as a bankrupt before doing so, it was held that the grantee could have proved the amount of the incumbrance in bankruptcy, which fact discharged all further liability. Drinkwater *v.* Moreman, 61 Ga. 395, was a case where the evicted purchaser was adjudicated a bankrupt, and the land having been set off to him as exempt, it was naturally held that his rights on the covenants were unaffected.

such has not been the case, on the one hand it was held in New York that the object of the act was to bar all existing claims, even when the liability imposed is uncertain and contingent, and their admission to proof must necessarily protract the settlement of the estate indefinitely; and hence that bankruptcy might be pleaded in bar of an action on a covenant for quiet enjoyment although no breach occurred till after the petition in bankruptcy had been filed;[1] and the same view was taken in other cases which went even further, and held the covenants discharged by bankruptcy even when the final breach did not occur till long after the discharge.[2]

On the other hand, it has been considered that if the right to damages is dependent upon eviction, no "demand" in the proper sense of that word can before that event arise, and hence that the remedy against the covenantor survives the discharge in bankruptcy when the latter precedes the eviction,[3] and this would seem to be the juster view of the law.[4] But where the right to damages depends upon a covenant which may have, as it were, a technical and a substantial breach, more difficulty

[1] Jemison *v.* Blowers, 5 Barb. (N. Y.) 686. The inconvenience arising from delay, and the provision of the tenth section of the act which required that all proceedings in bankruptcy should be brought to a close within two years, were pressed upon the court in this case. And yet notwithstanding some of the reasoning in the opinion, it may be doubted whether the case was not rightly decided, as the eviction (which took from the demand its elements of uncertainty and contingency) happened eight months before the covenantor's discharge in bankruptcy, and could clearly have been proved before the commissioner as a claim *in præsenti*.

[2] Bates *v.* West, 19 Ill. 135 (though reluctantly, and yielding only to authority, the point being considered to have been substantially ruled in Mace *v.* Wells, 7 How. (S. C. U. S.) 272, overruling s. c. in 17 Verm. 503); Baily *v.* Moore, 21 Ill. 169; Shelton *v.* Pease, 10 Mo. 473 (but see Magwire *v.* Riggin, 44 id. 514, *infra*, p. 508, n. 1).

[3] Bennett *v.* Bartlett, 6 Cush. (Mass.) 225; Bush *v.* Cooper, 26 Miss. 599, affirmed 18 How. (S. C. U. S.) 82; Burrus *v.* Wilkinson, 31 Miss. 537.

[4] As of course upon an action on a covenant for quiet enjoyment or of warranty if there has been no eviction, actual or constructive, there is no breach, no right to even nominal damages; no claim whatever has arisen upon the covenant. In Shelton *v.* Pease and Jemison *v.* Blowers, *supra*, the court referred to a passage by Coke, that a release of all demands releases "all mixed actions, a warranty which is a covenant real, and all other covenants, real and personal, conditions before they are broken or performed or after," etc. Co. Litt. 291 *b*. But Coke wrote long before bankrupt laws, and there is the evident difference between a release of an unbroken covenant or condition, and an attempt to enforce a demand upon such a covenant or condition. In Foster *v.* Woodward, 141 Mass. 160, Cunningham *v.* Scoullar, 4 Allen, (N. Br.) 385, and Burrowes *v.* De Blaquiere, 34 U. Can. Q. B. 498, the question was whether claims under covenants for title were debts within the respective local statutes of bankruptcy and insolvency.

has been felt, and when the covenant is one *in præsenti*, as for example a covenant against incumbrances, the "demand" has been held provable, even though no more than nominal damages (by reason of the absolute uncertainty whether loss will thereafter happen) can be awarded out of the bankrupt's estate, and his discharge may be pleaded in bar of the action brought after the real damage has been sustained.[1]

§ 304. Whether the liability created by covenants for title be joint, or several, or joint and several, obviously depends upon the terms in which they are expressed. Where an obligation is created by two or more, the general presumption is that it is joint,[2] and words of severance are required in order to confine the liability of the covenantor to his own acts.[3] Covenants implied

[1] Reed *v.* Pierce, 36 Me. 460; Magwire *v.* Riggin, 44 Mo. 514. In both these cases, as in others, the distinction was noticed between a contingent demand and a contingency whether there ever would be a demand. In Magwire *v.* Riggin it was held that an inchoate right of dower (the wife being living) was not a contingent demand, and the claim was not barred by the bankruptcy, while in Reed *v.* Pierce, where the incumbrance was a mortgage which was foreclosed after the bankruptcy, and the covenants were against incumbrances and of warranty, it was held that the claim under the former covenant was barred, while that under the latter was not. And in Chamberlain *v.* Meeder, 16 N. H. 382, and Stewart *v.* Anderson, 10 Ala. 504, it was held that a mortgagor's discharge in bankruptcy did not affect the covenant of warranty contained in the mortgage so far as it operated to pass an after-acquired estate by estoppel. See these cases *supra*, p. 378, n. 5.

[2] Touchstone, 375; Carleton *v.* Tyler, 16 Me. 392; Donohoe *v.* Emery, 9 Met. (Mass.) 67; Platt on Covenants, 117. Thus in Comings *v.* Little, 24 Pick. (Mass.) 266, one of two tenants in common mortgaged his moiety thereof, and subsequently both joined in a conveyance of the whole estate to the plaintiff, with a covenant that it was free from all incumbrances, and the plaintiff having redeemed the mortgage it was held that he could maintain his action against both covenantors. "It is objected," said the court, "that the covenants of the defendants are to be taken distributively, and that the action should have been brought against the mortgagor alone. But this objection cannot be sustained. The distinction is this. Where a man covenants with two or more jointly, and the interest and cause of action of the covenantees is several, each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint. But where two persons covenant jointly with another, a joint action lies for the covenantee on a breach of the covenant by one of the covenantors only, because they are sureties for each other for the due performance of the covenant. 1 Wms. Saund. 154, note." So where, in Click *v.* Green, 77 Va. 827, joint owners sold, covenanting that they "would warrant generally," it was contended that each was liable for only a moiety of the damages, but the court obviously held otherwise.

[3] Fields *v.* Squires, 1 Dead. (C. C. U. S.) 366, 373; Bardill *v.* Trustees of Schools, 4 Bradw. (Ill.) 94. Thus in Evans *v.* Sanders, 10 B. Mon. (Ky.) 291, where four heirs, "in consideration of $60, that is, $15 per share," conveyed certain land with a covenant "that each for his separate and undivided share warrants and will each separately for his own share defend," it was held proper to sue the four separately.

by operation of law, as from the word *demiserunt*, are coextensive with the interest granted, that is, joint if a joint estate, and several if a several interest.[1] In some of the United States it is provided by statute that joint covenants shall be taken to be joint and several.[2]

§ 305. The questions which arise as to the liability of a married woman on covenants for title may be divided into three classes: —

First. Her liability at common law;

Second. Her liability in equity as to her separate estate;

Third. Her liability under such modern statutes as are generally known as "Married Women's Acts."

§ 306. 1. And first, at common law.

It is familiar that in England until the present generation the estate of a feme covert, whether her own estate or her estate of dower in her husband's land, could not pass unless by her suffering a fine, which was a proceeding of record before a court whose judges were supposed to watch over the rights of the wife.[3] And it seems to have been held in a rather old case,[4] contrary to the doctrines of the common law, which ignored the liability of a feme covert as it did most of her rights,[5] that if husband and wife convey her land by fine with warranty, an action of covenant will lie against her, and though it was a case of the first impression, the judges "all thought that the action well lay against the defend-

[1] Coleman *v.* Sherwin, 1 Show. 79; s. c. 1 Salk. 137. Platt (Covenants, p. 117) remarks, "Very few questions have been agitated whether covenants on the part of the *covenantors* have been joint, several, or joint and several; the language has generally been sufficient to indicate the intention of the parties and the nature of the covenant in this respect." The question as to the rights of joint *covenantees* is, however, considered *infra*, § 315.

[2] Illinois Rev. Stat. 1883, p. 676, § 3; Montana Rev. Stat. 1879, p. 570, § 772.

[3] The modern acknowledgments contain nearly all the requirements to a valid fine; the wife must be of full age, examined "solely and secretly" as to whether she levied the fine "without any menace or threat," and "everything distinctly contained in the writ so as she perfectly understand what she doth," and "if the woman doth not speak any language that the judge doth understand," there should be an interpreter under oath. 2 Inst. 515.

[4] Wotton *v.* Hele, 2 Saund. 180; 1 Mod. 291.

[5] That is to say, such liabilities as affected the person, and not the land. The cases cited in the note to Wotton *v.* Hele in Saunders show that acceptance by a married woman of rent due under a lease binds her to the covenants contained in it, and the report in Modern says that "this point was agreed by the counsel on both sides, and so this court agreed," and by analogy it is held in Pennsylvania that if a conveyance of land be made to a married woman who joins her husband in a covenant to pay the ground-rent reserved as the entire consideration therefor, she is bound by her covenant. Cowton *v.* Wickersham, 54 Pa. 302.

ant on her warranty in the fine although she was covert-baron, and they did not make any scruple of it." [1] The case, however, stands alone in England; and in the United States, where fines have given place to a separate acknowledgment before a magistrate,[2] a cloud of authorities has settled that at common law a married woman is not bound to respond in damages by reason of any covenants for title made by her on the conveyance of her estate.[3]

[1] For the defendant it was argued, "For although femes covert may pass their rights in land by fine, because they are examined by a judge of record, yet they cannot bind themselves in a personal security by covenant, as in this case, for a feme covert cannot covenant to pay damages, nor can she bind herself in a statute or recognizance, though her husband join in with her;" while for the plaintiff it was said, "It is commonly seen that femes covert with their husbands by fines warrant lands in fee simple every day, and it binds them to warranty;" and in the report in Modern, "The law enables a feme covert to corroborate the estate she passes, and to do all things needed; if she levy a fine of her inheritance, she may be vouched, or a *warrantia chartæ*, etc. thereupon be had against her;" but for this, no authority was or could be cited. In the recent case of Hardy *v.* Mills, 13 Weekly Notes, (Pa.) 79, it was argued, on the authority of Wotton *v.* Hele, that a married woman was liable on the covenant implied from the words of grant (*supra*, § 285), and under the statute which provided that a deed separately acknowledged should be as valid as against the wife as though she were a feme sole; but it was obviously held that the statute meant no more than to pass the title. A similar decision as to liability on the implied covenants was made in Fellbush *v.* Stevens, 15 id. 237.

[2] As is now the case in England since the statute 3 & 4 Will. IV. c. 74.

[3] "The doctrine," says Kent (2 Comm. 167), "that a wife can be held bound to answer in damages after her husband's death on her covenant of warranty entered into during coverture, is not considered by the courts in this country to be law, and it is certainly contrary to the settled principle of the common law that the wife was incapable of binding herself by contract;" and to the same effect are Benton Co. *v.* Rutherford, 33 Ark. 640; Strawn *v.* Strawn, 50 Ill. 37; Butsford *v.* Wilson, 75 id. 132; Aldridge *v.* Burlinson, 3 Blackf. (Ind.) 201; Griner *v.* Butler, 61 Ind. 363; Falmouth *v.* Tibbatts, 16 B. Mon. (Ky.) 641; Hobbs *v.* King, 2 Met. (Ky.) 141; Menally *v.* White, 3 id. 593; Curd *v.* Dobbs, 6 Bush, (Ky.) 685; Colcord *v.* Swann, 7 Mass. 291; Nash *v.* Spofford, 10 Met. (Mass.) 192; Hovey *v.* Smith, 22 Mich. 170; Carley *v.* Fox, 38 id. 387; Wadleigh *v.* Gaines, 6 N. H. 17; Fowler *v.* Shearer, id. 21; Whitbeck *v.* Cook, 15 Johns. (N. Y.) 546; McAfee *v.* Bettis, 72 N. C. 28; Chambers *v.* Spencer, 5 Watts, (Pa.) 406; Dean *v.* Shelby, 57 Pa. 427; Porter *v.* Bradley, 7 R. I. 541; Foster *v.* Wilcox, 10 id. 443; Fletcher *v.* Coleman, 2 Head, (Tenn.) 388; Sumner *v.* Wentworth, 1 Tyler, (Verm.) 43; Sawyer *v.* Little, 4 Verm. 414. In the early case in Virginia of Nelson *v.* Harwood, 3 Call, 394, specific performance of a wife's covenant for further assurance was decreed on the ground that as all objections arising from supposed want of freedom of will on her part are removed by her private examination, her deed was as binding upon her as if she were a feme sole. But such has not elsewhere been generally considered to have been the effect of the modern acknowledgments, and a Virginia statute to the contrary was soon after passed; *supra*, p. 377, n. 3. But although not liable to respond in damages, the covenants of a married woman have often been held to bind her by way of estoppel or rebutter, although this effect also has been often denied. See *supra*, p. 376.

§ 307. 2. Her liability in equity as to her separate estate.

As an incident of the equitable doctrine which, contrary to that of the common law, recognized and enforced, through the medium of a trust, the right of a married woman to her separate estate, it came to be held that while she was thus protected, she should be correspondingly bound, and hence a feme covert was, as to her separate estate in equity, treated for all intents and purposes as a feme sole.[1] Such was and is the English rule to this day, and the adherence to it and the divergence from it by courts on this side of the Atlantic are sufficiently familiar; the English rule being adhered to in some States, while in others it is considered that a married woman has no powers over her separate estate in equity except those given to her by the trust instrument.[2]

§ 308. 3. Her liability under the "Married Women's Acts."

The American colonies were, as to some of their laws as to married women, nearly two centuries in advance of the mother country, and when and as they became States, the colonial doctrines continued, and the United States have been more than a generation in advance of England as to the passage of statutes

[1] This subject is exhaustively treated in the notes to Hulme *v.* Tenant, 1 Lead. Cas. in Eq. (4th Am. ed.) 679. See also Bispham on Equity, § 96 *et seq.*; 2 Perry on Trusts (2d ed.), § 625 *et seq.* It was accordingly held in New York, that although under the statutes of 1848 and 1849 then in force, a married woman was not liable *at law* for the breach of her covenants for title in a conveyance of her estate (Coakler *v.* Chamberlain, 38 How. Prac. 483), yet that she could be charged therefor *in equity*. Kolls *v.* De Leyer, 41 Barb. S. C. 208; s. c. 26 How. Prac. 468. Subsequent legislation has, however, made her so liable at law (*infra*, p. 513, n. 4), and there is now no distinction in New York between her liability at law or in equity. Nichols *v.* Kinney, 13 Weekly Dig. 418; Corn Exchange Bank *v.* Babcock, 42 N. Y. 622. In Alabama, also, the wife has been held liable in equity as to her separate estate. Gunter *v.* Williams, 40 Ala. (N. S.) 561. "A married woman is regarded in equity," said the court (p. 572), "so far as her separate estate created by contract is concerned, as a feme sole, and she may bind her separate estate by any contract by which she could bind herself if sole and unmarried. The power of the wife to bind her separate estate by the covenants of a deed is evidently asserted in this general principle, and we know of no case or doctrine upon which such power could be excepted from the general rule."

[2] Notes to Hulme *v.* Tenant, etc., *supra*. It is considered by the text writers referred to, that the States in which the separate estate in equity of a married woman is bound by her contracts, as an incident of the doctrine which protects it for their benefit, are Vermont, New York, New Jersey, Connecticut, Kentucky, Virginia, North Carolina, Georgia, Missouri, Minnesota, Maryland (it was formerly otherwise there), Florida, and California, and the doctrine has been approved by the Supreme Court of the United States; Cheever *v.* Wilson, 9 Wall. 119; Stephen *v.* Beall, 22 id. 329; while the States in which she is not so bound are Rhode Island, Pennsylvania, Ohio, Tennessee, Illinois, Alabama, South Carolina, and Mississippi.

protecting the property of married women. Still, the earliest of them are of comparatively modern date, and it is truly said that "these statutes have not yet been moulded into a consistent whole, nor have they received such judicial construction that any certain general principles can be safely affirmed of them all," [1] and it would be as difficult as it might be mischievous and misleading to attempt to trace with accuracy the course of legislation, and to analyze the course of judicial decision in our numerous States and Territories, each having its local laws. All that can or ought to be attempted is, therefore, to state, as accurately as the means will allow, what is the present law in the United States upon the subject as directly connected with covenants for title.

In Arizona, Colorado, Missouri, Nebraska, Nevada, New Mexico, West Virginia, and possibly other States, the doctrine of the common law has been affirmed by statutes providing that no covenant, express or implied, in a conveyance shall bind a married woman or her heirs, except so far as may be necessary effectually to convey from her and them all the estate conveyed.[2] In Vermont, Oregon, and Nebraska, the language is somewhat altered ; [3] in Iowa, it is provided that where either husband or wife joins in a conveyance of real property owned by the other, he or she so joining shall not be bound by the covenants of such convey-

[1] 2 Perry on Trusts, § 676.

[2] In Arizona, Comp. Laws of 1877, p. 382, § 20, the provision, substantially the same in many of the States, is thus : "No covenant expressed or implied in any such conveyance shall bind a married woman or her heirs, except so far as may be necessary effectually to convey from such married woman and her heirs all her rights and interest expressed to be conveyed in such conveyance." And to the same effect are the statutes in Colorado (Gen. Stats., 1883, p. 177, § 223), Missouri (Rev. Stats., 1879, p. 109, § 669), Nevada (Comp. Laws, 1873, vol. i. p. 84, § 261), New Mexico (Comp. Laws, 1885, § 2757), and West Virginia (Amended Code, 1884, p. 559, c. 73, § 6).

[3] Vermont Rev. Laws, 1880, p. 398, § 1923 : "A husband and wife may, by their joint deed, convey the real estate of the wife as she might do by her separate deed, if unmarried ; but the wife shall not be bound by a covenant contained in such joint deed." See Goodenough *v.* Fellows, 53 Verm. 102.

Oregon Gen. Laws. 1874, p. 515, c. 6, § 2 : "A husband and wife may, by their joint deed, convey the real estate of the wife in like manner as she might do by her separate deed if she were unmarried ; but the wife shall not be bound by any covenant contained in such joint deed." (See Fahie *v.* Pressy, 2 Ore. 23 ; Carter *v.* Chapman, id. 93 ; Hasty *v.* Ladd, 3 Ore. 353.)

Nebraska Comp. Stat. 1885, p. 482, § 48 : "A married woman shall not be bound by any covenant in a joint deed of herself and husband." There had been varied legislation before this time ; see Real *v.* Hollister, 17 Neb. 661.

ance, unless it is expressly so stated on the face thereof.[1] On the other hand, in Delaware, a middle ground seems to be taken, the statute providing that a married woman's deed shall not bind her to any warranty except a special warranty against herself and her heirs and all persons claiming by and under her, and that no covenant on her part of a more extensive or different effect shall be valid against her.[2] In New Jersey,[3] the statute is broader, while in Maryland, New York, Rhode Island, and Indiana it is expressly provided that a married woman shall be bound by her covenants as if she were a feme sole.[4]

These seem to be the only States in which the liability on covenants for title is expressly provided for. Of course, as such covenants are mere contracts, they fall within such broader statutes as exist in many States declaring how and to what extent a married woman shall or shall not be bound by her contracts generally. Thus, for example, in the late English Married Women's Property Act of 1882, which, a generation and more behind most of such legislation in the United States, perhaps goes beyond any of them in its breadth, it is declared that "a married woman shall be capable of entering into and rendering her-

[1] Iowa Rev. Code, 1884, p. 524, § 1931.

[2] Delaware Rev. Stats. 1874, p. 501.

[3] New Jersey Rev. Stats., 1877, p. 638, § 7: "In any deed hereafter made by any married woman of full age, who joins with her husband in executing said deed, of any lands or of any estate therein, it shall be lawful for her to enter into any covenant as to the title of the lands thereby conveyed, or against incumbrances thereon, or warranting the same; provided, that such covenants, except so far as relates to land, or some interest therein owned by her in her own right, shall have no greater or other effect than to estop her and all persons claiming as her heirs, or by or through her in the same manner as if she were a single woman."

[4] Maryland Rev. Code, 1878, p. 483, § 29: "In all deeds hereafter made *to* married women of real estate or chattels real, it shall be competent for the grantee or lessee to bind herself and her assigns, by any covenant running with or relating to said real estate or chattels real, the same as if she was a feme sole."

New York Rev. Stats., 1882, vol. iii. p. 2338, § 3: "Any married woman possessed of real estate as her separate property may bargain, sell, and convey such property and enter into any contract in reference to the same, with the like effect in all respects as if she were unmarried, and she may in like manner enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken."

Rhode Island Pub. Stats., 1882, p. 422, § 4, providing that the covenants of a married woman relating to her separate real estate "shall be binding upon her and her legal representatives when made by deed in which such married woman joins with her husband, such deed to be acknowledged," etc.

Indiana Rev. Stats., 1881, p. 1107, § 5118: "A married woman shall be bound by her covenants of title in conveyances of her separate property, as if sole."

self liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole,"[1] and no one could doubt that under this her liability on her covenants was beyond question. So in Massachusetts, the Public Statutes of 1882 provide that "a married woman may make contracts, oral and written, sealed and unsealed, in the same manner as if she were a feme sole, except that she shall not be authorized hereby to make contracts with her husband,"[2] and statutes more or less similar have been passed in many other States.[3] But the subject is too extensive and too essentially local to be more fully considered here.

§ 309. 2. *Of the Heir.* — The liability (whether immediate or ultimate) of the heir by reason of his ancestor's covenants for title depends in this country, to a great extent, upon the statutory provisions adopted in the different States for making the real

[1] The statute goes on to say, "and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise;" and the next section provides that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." Act of 45 & 46 Vict. c. 75, L. R. xvii. Stat. 454. It is not necessary here to refer to the previous act of 1870, 33 & 34 Vict. c. 93.

[2] Mass. Pub. Stats., 1882, p. 819.

[3] As very recently in Pennsylvania by the act of June 4, 1887. The subject is treated in Schouler on Husband and Wife, 2d ed., § 204 *et seq.*; 3 Washburn on Real Property, 5th ed. 261. In an article in 6 Southern Law Review, 633, it is stated, as an illustration of the want of crystallization of such legislation, that in Connecticut eleven Married Women's Acts were passed within twenty-one years.

In the fourth edition of this treatise reference was made to decisions in Massachusetts, Alabama, Iowa, and elsewhere, upon statutes which have since been repealed, and which are, therefore, here omitted. They are, however, of course applicable to all cases depending upon the law in force when the cause of action arose. It may be said, in passing, that the same divergence of doctrine as to the construction of the Married Women's Acts has at times prevailed in the different States as has taken place with respect to a married woman's separate estate in equity, it being held in some of them that if the law gives to her a benefit, she should take it subject to its incidental burdens. Gunter *v.* Williams, 40 Ala. 561; Richmond *v.* Tibbles, 26 Io. 474; Basford *v.* Peirson, 7 Allen, (Mass.) 504; Fenton *v.* Lord, 128 Mass. 466; Coolidge *v.* Smith, 129 Mass. 554; Huyler *v.* Atwood, 26 N. J. Eq. 504. In others it is held that as the common law gave her immunity from contract, the protection should not be taken away by implication. Stidham *v.* Matthews, 29 Ark. 650; Gore *v.* Carl, 47 Conn. 291; Botsford *v.* Wilson, 75 Ill. 133. And in some States, the ebb and flow of judicial decision have covered both sides of the doctrine. See for example the cases cited in Richmond *v.* Tibbles, *supra*, and Schouler on Husband and Wife, § 270.

estate of a decedent liable for the payment of his debts, although as respects the source of this liability there is no difference either in England or here between the covenants for title and any other specialty contracts.

In order that an heir should be liable upon the obligations of the ancestor, there were two requisites necessary at common law. First, that he be expressly named ;[1] so that in an action against him as heir the averment was necessary that he was named in and bound by the obligation, and this, as has been seen, was the rule as to the ancient warranty ;[2] and secondly, that he should have assets by descent sufficient to meet the demand, and he was bound by the warranties, covenants, or other specialties of his ancestor only to the extent of these assets.[3] A spe-

[1] Co. Litt. 209 *a*. It has sometimes happened that careless conveyancing has framed the covenants so as to bind the heirs, executors, etc. of the grantor, but not himself. In such a case in Illinois (Rufner *v.* McConnell, 14 Ill. 168), it was held that, although it was an unusual covenant, the parties were bound by its terms ; until the death of the grantor there was no party *in esse* who could be called upon to avouch the title, and the presumption was that the grantor refused to become personally responsible but was willing to charge his estate, and that the grantee preferred to accept such a covenant rather than have none at all ; if, however, it were owing to mistake, such could only be rectified in a court of equity upon application to reform the deed, and in the later cases of Baker *v.* Hunt, 40 id. 264, and Traynor *v.* Palmer, 86 id. 477, this was approved. In Hawk *v.* McCullough, 21 id. 220, it was held that a covenant that the heirs, etc. of the grantor should defend, did not qualify the covenant implied by the words "grant, bargain, and sell," and that the grantor was himself liable upon the latter covenants. In a case in Wisconsin, however, (Hilmert *v.* Christian, 29 Wis. 104,) the court saw no force in the objection that the grantor did not covenant for himself, but only for his heirs ; it was plain enough upon the face of the instrument that he bound himself by those covenants. And recently in Michigan, it was considered that inasmuch as the liability of the heirs resulted solely from the obligation on the ancestor, the latter must necessarily be bound unless he could be held to be acting as their agent and under their authority, which could not be pretended. Smith *v.* Lloyd, 29 Mich. 382. In Bowman *v.* Long, 89 Ill. 19, the covenants were several, "except J. E. and his legal representatives," and the contention that his heirs did not come within the exception as not being legal representatives was denied.

[2] Brooke's Abr. tit. Garranties, pl. 89 ; *supra*.

[3] Buckley *v.* Nightingale, 1 Strange, 665 ; 2 Black. Comm. 243 ; for the doctrine of lineal and collateral warranty, see *supra*, § 8 *et seq*. In Hall *v.* Martin, 46 N. H. 337, it was held that although by the common law the heir was liable on the covenants of his ancestor just so far only as he had assets by descent, and that as *real* estate alone descended to him, his liability was limited to that, irrespective of any *personal* estate which he might have received as next of kin, yet where by local statute the personal estate was made to descend to him substantially in the same way, it should be treated as assets in his hands equally with the real estate. Per Bellows, J. ; Perley, C. J., and Bartlett, J., dissenting. Under a statute of Indiana, abolishing "lineal and collateral warranties, with all their incidents," it has been held that the warranty of a ten-

cialty creditor acquired, however, additional means of recompense by the death of his debtor, for although by the common law during his lifetime no recourse whatever could be had to his lands by means of execution, and the statute of Westminster the Second [1] gave but the right to have one half of them extended or delivered under a writ of *elegit*, yet after the death of the debtor an action would lie against the heir upon the specialty debts, by means of which *all* the assets by descent were liable to be taken in execution.[2]

The result was that the bond creditor had, after his debtor's death, a greater security than the judgment creditor; for the latter, by reason of his judgment, charged the heir only as tenant of the land. No personal action would lie against the heir on such judgment, and the only remedy of the creditor was by *scire facias* to have execution of the lands, which, as has been seen, under the statute of Westminster he could have but to a limited extent,[3] as the death of the ancestor did not alter the nature of the execution any more than it did the nature of the debt,[4] while on the bond debts the creditor could at his election, by a special judgment, have execution upon all the lands in the possession of the heir.

ant by the curtesy does not bar the heirs of the mother, even though they received assets by descent from the covenantor (see *supra*, p. 358, n. 2), but that the personal representatives of the latter were liable for the damages caused by a breach of his covenant. Hartman *v.* Lee, 30 Ind. 281.

It was obviously held in Hart *v.* Thompson, 3 B. Mon. (Ky.) 485, that heirs of their mother's estate could not be made to pay, out of it, damages caused by a breach of their father's covenants for title, and the law was held the same way in Urquhart *v.* Clarke, 2 Rand. (Va.) 549. See also Platt on Covenants, 450, and *supra*, § 239.

In Dickinson *v.* Hoomes, 8 Grat. (Va.) 410 (noticed as to another point, *supra*, p. 483, n. 2), the court admitted that assets which had descended to the heir in Kentucky could not be noticed in an action against that heir in Virginia, on a bond of his ancestor, but decided (on the authority of that familiar class of cases of which Penn *v.* Lord Baltimore, 1 Ves. 444, is the leading one) that a court of equity would, upon proof of such assets, in the exercise of its jurisdiction *in personam*, and where the case was already before the court for another purpose, on proof of such assets, decree an account thereof by the heir, towards the satisfaction of a covenant of warranty made by the ancestor. In Beall *v.* Taylor, 2 Grat. (Va.) 532, it was held that a judgment against heirs in another State, where there were no assets, did not merge the covenants, and that the plaintiff might sue the heirs in Virginia, where the assets were. The difference between the common law and the West Virginia Revised Statutes was shown in the recent case of Rea *v.* Creel, 22 W. Va. 373.

[1] 13 Edw. I. c. 18.

[2] Harbert's case, 3 Rep. 12 *a*; Davy *v.* Pepys, Plowd. 441.

[3] Harbert's case, *supra*; Bowyer *v.* Rivitt, W. Jones, 87.

[4] Stileman *v.* Ashdown, 2 Atk. 608.

A *warrantia chartæ* or a voucher, being both essentially real actions, could of course be brought only against the heir, but upon covenants, as upon other specialties, the creditor might sue either heir or executor at his option, or bring separate actions against them at the same time,[1] so that an heir could not plead in an action brought against him that there was an executor who had assets.[2]

Nor was there at common law any distinction between bond debts and covenants, either as to the liability of the heir to be sued upon them, or the right of the covenantee to come in upon the assets as a specialty creditor;[3] nor, consequently, between covenants for title and other specialties,[4] nor was it material whether the covenant was broken before or after the covenantor's death, provided the amount of the damages was liquidated.[5]

But although the heir was thus bound by his ancestor's bonds and covenants when named in them, and to the extent of the assets, yet if, before suit brought, he had aliened the lands which he had inherited, the creditor was without remedy.[6] The "statute of fraudulent devises"[7] was intended to remedy this mischief, doubtless not only with respect to the ancestor's specialty *debts*, but perhaps also as to his *covenants*, as the fifth section of that statute, after reciting that many heirs at law, to avoid the pay-

[1] Brooke's Abr. Assets per Descent, pl. 33; Com. Dig. Pleader, 2 E. 8; Quarles *v.* Capell, Benl. 96; s. c. 2 Dyer, 204 *b*.

[2] Galton *v.* Hancock, 2 Atk. 426; Davy *v.* Pepys, Plowd. 441; Quarles *v.* Capell, *supra;* Davies *v.* Churchman, 3 Lev. 189.

[3] Plumer *v.* Marchant, 3 Burr. 1384; Godolph. Orph. Leg. pt. 2, c. 28; Went. Ex. 146; Dyke *v.* Sweeting, Willes, 585; Benson *v.* Benson, 1 P. Wms. 131; Musson *v.* May, 3 Ves. & Beames, 194; Jenkins *v.* Briant, 6 Simons, 603; Watson *v.* Parker, 6 Beav. 283; Frazer *v.* Tunis, 1 Binney, (Pa.) 254.

[4] Cruise, c. 20, § 66; Higgingbotham *v.* Cornwell, 8 Grat. (Va.) 86; Gaynard *v.* Eslava, 20 Ala. 732; Post *v.* Stiger, 2 N. J. Eq. 534. In the case of Earl of Bath *v.* Earl of Bradford, 2 Ves. 587, one who had received a covenant for quiet enjoyment, and whose damages were liquidated by a recovery against the executor, was held by Lord Hardwicke to be a specialty creditor. In Giles *v.* Roe, 2 Dickens, 570, the same was applied to a covenant for seisin, and in Parker *v.* Harvey, 2 Eq. Ca. Ab. 460, and Fergus *v.* Gore, 1 Sch. & Lef. 107, to a covenant against incumbrances; and in the recent case of *In re* Dickson, L. R. 12 Eq. 154 (*infra*, Ch. XV.), to a covenant for further assurance. In Lovell *v.* Sherwin, 2 Eq. R. 329, the deed contained all the covenants for title.

[5] Cox *v.* King, 9 Beav. 533; Hervey *v.* Audland, 14 Sim. 531; Lomas *v.* Wright, 2 Mylne & Keen, 769; Eardley *v.* Owen, 10 Beav. 572; see *infra*, Ch. XV.; Davis *v.* Smith, 5 Ga. 285; Stultzfoos's Appeal, 3 Pa. (old Pa., not Pa. St.) 265.

[6] Plunket *v.* Penson, 2 Atk. 290; Davy *v.* Pepys, Plowd. 439.

[7] 3 & 4 Will. & Mary, c. 14.

ment of such just debts as in regard to the lands descending to them they had become liable to pay, had aliened such lands before process was or could be issued against them, declared that the heir should be answerable for such debts, in an action of debt, to the value of the lands so aliened, saving that the lands *bona fide* aliened should not be liable to execution.[1] But however this section may have been intended to protect as well a covenantee as a specialty creditor, it seems to have failed of its object, for first, the cases of Wilson *v.* Knubley[2] and Farley *v.* Briant,[3] though based upon another section of this statute to be presently referred to, held that its provisions, which are very similar to that just cited, applied to *debts* and actions of *debt*, and could not receive so liberal a construction as to include *covenants*; secondly, it was quite usual to find in English conveyancing a bond to secure the performance of covenants, on which, as is seen in many of the cases, actions of debt will lie,[4] which practice has been supposed to have been introduced in order to bring the case within the letter of the statute; and thirdly, in a later statute,[5] intended

[1] Before the passage of the statute of frauds (29 Car. II. c. 3), descended trust estates were not assets in the hands of the heir. But that statute provided that if any *cestui que trust* should die, leaving a trust in fee simple to descend to his heir, the trust should be taken to be assets by descent, and the heir liable, by reason of such assets, as fully and amply as he might have been if the estate in law had descended to him by possession in like manner as the trust descended. Platt (Covenants, p. 451) remarks, "A right of action against the heir, in respect of such assets by descent, cannot, it is apprehended, be defeated by his alienation of the estates prior to the commencement of, or pending legal proceedings; the charge once attaching will, it is supposed, continue in operation against him and his personal representatives, for the benefit of the covenantee or his representatives, until compensation be made for any breach of the covenant committed during the lifetime, or even after the decease of the ancestor."

[2] 7 East, 128.

[3] 3 Ad. & Ell. 839.

[4] It may be supposed that there are also reasons which, in this country, seem to point out the propriety of taking a bond for the performance of covenants; on the ground that although a covenant itself, if unbroken at the death of the covenantor, would not be a lien upon his real estate, yet a bond for the performance of such a covenant might be a lien. Such an opinion, however, seems not tenable. In Godolph. Orph. Leg. pt. 2, c. 28, it is said: "But executors (under pretence or color of recognizances for the peace or good behavior, or the like, or under pretence of statutes for performing covenants touching the enjoying of lands not forfeited, nor any sums of money possibly ever thereupon becoming payable) are not to withhold payment of debts by specialty, and thereby defraud the creditors, so that if the statute or recognizance be only for performance of covenants, and no covenant be broken, an obligation for the payment of present money shall be discharged before it." But the passage merely refers to the duty of the executor as to not withholding payment on such pretences.

[5] 1 Will. IV. c. 47, known as Sugden's Act.

to amend and supply the defects in the statute of fraudulent devises, after the words "liable to pay the debts" is inserted "or perform the covenants," and the word "covenants" is introduced after "debt or debts" wherever it occurs.[1]

§ 310. The peculiar difference which appears to exist between the English and American law as to the liability of an heir on his ancestor's covenants for title is, that while in England the covenant is of course no lien upon his real estate during his life, so it does not become one after his death until action brought; and in case no action is brought, or if, before such action, the heir *bona fide* alien the land, the purchaser will take it clear of liability, whether the covenant be broken before or after the covenantor's death.[2] If the alienation be a fraudulent one, though the purchaser's title will still be secured to him, yet the heir will be liable out of his own estate to the value of the lands thus aliened; and if the lands have not been aliened at all, but still remain in the heir's possession, he will be liable to the extent of their value, both by common law and by statute, and the covenantee may sue the heir or the executor, at his election.

But in the United States, it may be said that as a general rule lands are liable for the debts of a decedent, whether due by matter of record,[3] by specialty, or by simple contract. In the last two

[1] These statutes will be found in Ram on Assets, 213; and in the notes to Jefferson *v.* Morton, 2 Saund. 7, and to Silk *v.* Prime, 2 Lead. Cas. in Eq.

[2] The law is thus stated in the note to Silk *v.* Prime, 2 Lead. Cas. in Eq.: "Neither debts by specialty in which the heirs are bound, nor simple contract debts, even since the 3 & 4 Will. IV. c. 104 (*infra*, p. 521, n. 1), constitute a lien or charge upon the land, either in the hands of the debtor or of his heir or devisee. Notwithstanding the existence of such debts, the debtor himself may alienate the land. By taking proper proceedings, the creditors, both by specialty and proper contract, may obtain payment out of the descended or devised real estate in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee, whether upon a common purchase or on a settlement, even with notice that there are debts unpaid, the land is not liable, though the heir or devisee remains *personally* liable, to the extent of the value of the land alienated. Richardson *v.* Horton, 7 Beav. 112, 123; 4 Mylne & Cr. 268, 269; Sugden on Vendors, 834, 835; Spackman *v.* Timbell, 8 Sim. 259, 260; but see Pimm *v.* Insall, 7 Hare, 193, where it was held that creditors would not be defeated by the marriage articles of an infant heir at law." Pimm *v.* Insall went however upon the ground that the marriage articles in question were not binding upon the wife, who had died without having done any act to confirm them, and hence that the real estate of her ancestor descended to her heir discharged from the articles, and subject to their original liability to pay the debts of the ancestor; s. c. on appeal, 1 Macn. & Gord. 449; and see Peachy on Marriage Settlements, 29.

[3] The words "matter of record" here include not only things which appear on

cases, the existence of the debt, unless it be reduced to judgment, creates no lien during the debtor's life. By his death, however, its quality is changed, and it becomes a lien upon his real estate, which descends to the heir or passes to the devisee subject to the payment of the debts of the ancestor according to the laws of the State in which it lies,[1] and the rights of the creditor can, in most of the States, be enforced against the lands in the hands of a *bona fide* purchaser,[2] within certain statutory limitations as to time.

But while this is the general doctrine, yet its application is of course modified by local laws. By the common law, as we have seen, a covenantee might sue either the executor or the heir at his election, but this has been altered by statute in many States, and in them the liability of an heir on the covenants of his ancestor is a contingent one, depending upon the inability of the covenantee to procure satisfaction out of the personal estate.[3]

the records of a court, such as judgments, recognizances, and the like, but those which are recorded or registered under local statutes, such as mortgages, etc.

[1] Watkins *v.* Holman, 16 Pet. (S. C. U. S.) 63 ; 4 Kent's Comm. *421 ; 2 Hilliard's Abr. 539.

[2] Gore *v.* Brazier, 3 Mass. 523 ; Graff *v.* Smith, 1 Dall. (Pa.) 481 ; Morris *v.* Smith, 1 Yeates, (Pa.) 244 ; Ricard *v.* Williams, 7 Wheat. (S. C. U. S.) 59 ; Griswold *v.* Bigelow, 6 Conn. 268.

[3] Webber *v.* Webber, 6 Greenl. (Me.) 136 ; Hutchinson *v.* Stiles, 3 N. H. 404 ; and see the later case of Ticknor *v.* Harris, 14 id. 272, for a review of the common law and the English and New Hampshire legislation, and the more recent case of Hall *v.* Martin, 46 id. 337 (*supra*, p. 515, n. 3) ; Roe *v.* Swezey, 10 Barb. S. C. (N. Y.) 247 ; Stuart *v.* Kissam, 11 id. 271 (see Haynes *v.* Colvin, 19 Ohio, 396) ; Boyd *v.* Armstrong, 1 Yerg. (Tenn.) 40 ; Hartman *v.* Lee, 30 Ind. 283. And in Royce *v.* Burrell, 12 Mass. 399, where the heir was sued on the ancestor's covenant for title, the plaintiff was nonsuited on the ground that application had not been first made to the personal estate through the administrator. The remark of Gibson, C. J., in Fritz *v.* Evans, 13 Serg. & Rawle, (Pa.) 14, that "in Pennsylvania, lands being in all cases assets for the payment of debts, only the executor can be sued," would seem to apply to all other States where lands are thus made assets in the hands of the executor, and in them the immediate liability of the heir by an action of covenant against himself would seem to be taken away. As to his *ultimate* liability, the statutory provisions are, in different parts of the country, widely different. In many States the land can be summarily taken in execution in the hands of the heir or devisee, upon a judgment thus obtained against the personal representative. This was formerly the law in Pennsylvania (Payne *v.* Craft, 7 Watts & Serg. 465 ; Benner *v.* Phillips, 9 id. 13 ; Keenan *v.* Gibson, 9 Pa. 250), but has since been altered in that State, and a *scire facias quare executionem non* is now directed to the heirs and devisees, with notice to the terre-tenants, who, notwithstanding the judgment against the personal representative, will, in some cases, be let in to contest the claim on its original grounds. Murphy's Appeal, 8 Watts & Serg. 165 ; Atherton *v.* Atherton, 2 Pa. 113 ; Butler *v.* Slam, 50 Pa. 456. In Chambers *v.* Wright, 40 Mo. 482, certain tenants in common having made partition, covenanted with each other for themselves, their heirs and personal representatives,

It is not, however, proposed to discuss the interesting subject of the liability of real estate for the debts of a decedent. It is one almost exclusively local in its application, and it may be sufficient to have briefly referred to the common law, and pointed out the sources whence fuller information may be derived with respect to its alteration.[1]

that in the event of any suits being brought against either of them respecting the title, the expenses should be equally borne between them. After the death of all of them, such suits were brought against the estate of one of them, whose administrator then sued the heirs and devisees of one of the others for contribution, but it was held that this was "purely a personal and collateral covenant, and does not belong to the class of covenants which run with the land and concern the tenure and enjoyment of the property conveyed," and a demurrer to the petition was sustained. The case may have been correctly decided on one of the grounds taken, viz. that the suit could not be brought by the administrator, who had nothing to do with the real estate. Otherwise it would certainly seem that the purpose for which the covenant had been entered into was defeated.

In Coakley *v.* Chamberlain, 38 How. Pract. (N. Y.) 483, a tenant for life under her husband's will, with remainder to her children, married again and leased for a term of years, covenanting for quiet enjoyment, and died before the expiration of the term, when the tenant, being evicted by the children under proceedings in partition, brought covenant against them and the executor of their mother the covenantor. As against the former it was held that the plaintiff could not recover, although they had received the rent of the premises from their mother's death to the partition, as it was said that this receipt was no ratification of the covenant, and that the rent was assets, not of their mother's, but of their father's estate, and as against her executor the plaintiff could not recover because the covenant was that of a married woman.

[1] It may however be observed, that in tracing the course of legislation in the different States, they will be found greatly in advance of English legislation on the subject. The old feudal doctrines, which to prevent the alienation of real estate cumbered it with restraints, gave place, when a new state of society demanded that the right of alienation should be less fettered, to an immunity of real estate which protected the purchaser at the expense of the creditor, and the legislative provisions which until recently existed were inadequate to regulate the equal interests of both, for such was the state of the law that a man might borrow £100,000 to buy an estate, and, dying, leave it to his son without a penny of the debt being repaid, and it was not until the year 1833 that by the statute 3 & 4 Will. IV. c. 104, freehold estates were made assets for the payment of simple contract debts, and all will remember the anxious and untiring efforts of Sir S. Romilly to bring about such provisions sixteen years before that time, and the clamor which was raised in opposition to it, to the effect that "the heir's right to the real property of his ancestor ought not to be disappointed by the claims of creditors," which was said by so good a lawyer as Sir William Grant. See the remarks of Sir S. Romilly in his Autobiography, vol. ii. p. 389, and also Campbell's Lives of the Chancellors, vol. vii. p. 266.

On the other hand, from the earliest settlement of some of the American colonies, the doctrine of the liability of a decedent's lands to the payment of his debts, whether due by matter of record, specialty, or simple contract, has been said to have grown up with the law. In many of them the death of the debtor changed his debts into liens, and a purchaser or a devisee stood in no better position than the vendor or the testator. Morris *v.* Smith, 1 Yeates, (Pa.) 244. In a few only of the colonies is this believed to have been other-

§ 311. 3. *Of the Devisee.* — Much of what has been said as to the liability of the heir applies equally to that of the devisee. At common law, he was not bound by the covenants of his testator, nor could the lands be followed in his hands.[1] In this respect he enjoyed an even greater immunity than the heir; for the latter, when named in his ancestor's covenants, was liable to the amount of the assets which had descended to him, but a devisee took the land clear of all liability.[2] It will be remembered that an heir cannot strictly be said to take also as devisee, as the familiar rule applies, that one taking the same estate under his ancestor's will as he would do as his heir by operation of law is adjudged to take by descent and not by purchase, and the lands would be liable if not aliened.

To prevent the injustice of a devise depriving a specialty creditor of means of satisfaction, the second section of the statute of fraudulent devises,[3] reciting that many persons, after having

wise. It has been assumed by eminent authority that real estate is, in general, and has been from the earliest settlement of the colonies, liable for the debts of the ancestor in the hands of his devisees, his heirs, and *bona fide* purchasers from them; 4 Kent Comm. *421; Watkins *v.* Holman, 16 Pet. (S. C. U. S.) 63; Bergin *v.* McFarland, 6 Fost. (N. H.) 536; but in fact the statute 5 Geo. II. c. 7, expressly declared that lands, etc. in all the American colonies should be assets for the payment of debts. And in Turner *v.* Cox, 8 Moore's Privy C. Cas. 288, it was shown that in the *West India* colonies lands had been from their earliest settlement assets for the payment of *all* debts. The contrast, therefore, between the colonial and the home policy is sufficiently striking. In Pennsylvania, there were many statutes to this effect prior to the year 1705, to which a reference may be found in the note to 1 Smith's Laws, 9, and the Appendix to Miller's edition of Acts of Assembly, published in 1762, and the dissenting opinion of Kennedy, J., in Bellas *v.* McCarty, 10 Watts, 31.

In the fourth edition of this treatise reference was here made at some length to decisions on this subject as connected with covenants for title in North Carolina, Connecticut, and New Hampshire, which are necessarily omitted here. In the following cases on this side of the Atlantic, the liability of the heir on the covenants of his ancestor is considered: Clark *v.* Winchell, 53 Verm. 408; Julian *v.* Boston, &c. Railroad Co., 128 Mass. 555; Armstrong *v.* Wing, 17 N. Y. Sup. C. (10 Hun), 520; New Jersey Ins. Co. *v.* Meeker, 37 N. J. Law, 282 (where the subject is elaborately argued and considered, and the differences shown between the New Jersey statute and that of 3 & 4 W. & M. c. 14); Crisfield *v.* Storr, 36 Md. 129; Rex *v.* Creel, 22 W. Va. 373; Sidener *v.* Hawes, 37 Ohio, 532; Crocker *v.* Smith, 10 Bradw. (Ill. App.) 376; Payson *v.* Hadduck, 8 Bissell, (C. C. U. S.) 293; Taylor *v.* Priest, 21 Mo. App. 685; Hendricks *v.* Keesee, 32 Ark. 714; Hall *v.* Brewer, 40 id. 433; Sharpless *v.* Gregg, 45 Io. 649; McDonald *v.* McElroy, 60 Cal. 484; Chewett *v.* Moran, 17 Fed. Rep. 820 (1883). Most of the above cases arose under alleged breaches of the covenants for title.

[1] Plunkett *v.* Penson, 2 Atk. 290; Plasket *v.* Beeby, 4 East, 491.

[2] See *supra*, p. 517.

[3] 3 & 4 W. & M. c. 14; *supra*, p. 517.

bound themselves and their heirs, had died seised of lands, and to the defrauding their creditors had devised the same, so that the creditors had lost their debts, declared that all wills, etc., should be taken, as against such creditors and their executors, etc., to be void and of no effect; and the third section gave the creditors a right of action upon their specialties against the heir and devisee jointly, and the devisees were made liable in the same manner as heirs, notwithstanding alienation by them.

The operation of this statute was, however, restricted by the courts to actions of debt for breaches in the covenantor's lifetime,[1] and only when there was an heir, so that its effect had to be extended by subsequent legislation.[2] As the decisions on the statute of fraudulent devises, though possibly correct as construing a statute which gave a new remedy against devisees, were based on very technical grounds, their authority has not controlled cases not arising strictly within their own lines,[3] and later cases have even extended the meaning of the word *debt* to unliquidated damages accruing after a testator's death.[4]

[1] In Wilson *v.* Knubley, 7 East, 134, it was said by Lord Ellenborough that the grievance recited in the preamble of the statute would have led one to suppose that the legislature meant to give a larger remedy than the action of *debt*, yet the court felt themselves bound by the letter of the statute, which spoke only of debts and actions of debt; and in an action brought against the devisee of one who had given covenants for title and died without heirs, judgment was given for the defendant, though it was agreed that the case came within the mischief intended to be remedied by the statute. The point that there being no heir the case did not come within the letter of the statute, which gave a remedy against the heir and devisee jointly, though mentioned in the argument, did not form a basis of the decision; but in Hunting *v.* Sheldrake, 9 Mees. & Welsb. 256, it was expressly held that a specialty creditor could not maintain an action against the devisee alone, there being no heir. So in Farley *v.* Briant, 3 Ad. & Ell. 839, it was further held that this statute applied only where a debt in the ordinary sense of the word existed between the parties in the lifetime of the debtor, and therefore that an action of debt did not lie against the heirs and devisees of a surety for breaches of covenant which did not occur in his lifetime, even though the damages upon the occurrence of such breach were liquidated, so that in form they might be sued for in an action of debt.

[2] Act of 11 Geo. IV. c. 47, soon after supplied by that of 1 Will. IV. c. 47, which expressly includes covenants as well as debts, and also gives an action against the devisee alone where there is no heir; and see the notes to Silk *v.* Prime, 2 Lead. Cas. in Eq., and to Jefferson *v.* Morton, 2 Saund. 8 *a*.

[3] Thus in Jenkins *v.* Briant, 6 Sim. 603, where a testator covenanted to pay an annuity which after his death fell in arrears, it was held that the devisees were liable, on the ground that the sums to be recovered were fixed and certain. The case was distinguished from Wilson *v.* Knubley, inasmuch as there the covenant was said to be contingent, and unascertained damages only could be recovered for a breach of it; here the covenants were absolute and the sums to be recovered were certain.

[4] In Bermingham *v.* Burke, 2 Jones &

§ 312. 4. *Of the Executor or Administrator.* — The liability of an executor differs from that of the heir, in that while the latter

La T. 699, where a testator devised lands to trustees to pay off by sale thereof all such just debts as he should happen to owe at his decease, it was held that damages accruing after his death from breach of his covenant for quiet enjoyment were a debt within the meaning of the will. The case was before Sugden, Ch., who had argued and gained Jenkins *v.* Briant. "Before," said he, "the legislation bound all the assets of a testator by debts of the present description, a man was said to sin in his grave who did not sufficiently provide for his debts. It could not be disputed that this claim must have been admitted, had the testator simply said 'all my past debts.' It appears to me that is what he intended, and the supposed words of restriction are introduced only not to confine the trust to the debts which he *then*, that is, at the time of making his will, owed." Morse *v.* Tucker, 5 Hare, 79, was similarly decided a few months later. A testator covenanted with his lessee for quiet enjoyment, and afterwards devised his real estate, subject to and charged with the payment of his debts. After the death of the lessor the lessee was evicted, and brought his action against the executors of the lessor, who having pleaded *plene administravit*, the plaintiff took judgment of assets *quando acciderunt*, and had his damages assessed upon writ of inquiry, and then filed a bill against the devisees of the lessor for satisfaction of these damages out of the real estate devised. It was contended on behalf of the devisees, (under Wilson *v.* Knubley and Farley *v.* Briant, *supra*, as also in Jenkins *v.* Briant, 6 Sim. 603,) that as the damages were unliquidated at the death of the testator, they could not constitute a *debt* within the meaning of the will, but Wigram, V. C., declared that he would be inclined, in the absence of authority, strongly to lean against that construction of the will which would exclude the claim in question. He did not agree that claims such as these were, in a moral point of view, distinguishable from debts due at the death of the testator, for if, he said, a person sells an estate for its full value, and in consideration of that value being paid to him by the purchaser, by covenant guarantees the title, he could not agree that such vendor was justified in enriching his personal estate at the expense of the purchaser, and afterwards disposing of his property by will so as to make his guarantee valueless, though the title to the property should turn out good for nothing, and he referred the case to a master to inquire upon the question of damages. The Vice-Chancellor, moreover, was glad to conceive that the case was ruled by the decision in Earl of Bath *v.* Earl of Bradford, 2 Ves. 589, and Lomas *v.* Wright, 2 Mylne & Keen, 775, in neither of which however was the point argued or very distinctly made; in the first case, because Wilson *v.* Knubley was not decided till nearly fifty years afterwards, and in the second, the plaintiffs being volunteers (claiming under a voluntary settlement for illegitimate children, see Williamson *v.* Codrington, 1 Ves. 511, *infra*, Ch. XV.) were held not entitled to compete with simple contract creditors for valuable consideration, but, as against the devisees of the debtor, they were held entitled to stand in the place of mortgagees who had exhausted the fund provided by the testator for the payment of debts. The Vice-Chancellor was doubtless not then aware of Bermingham *v.* Burke, which was much more in point. In *In re* Dickson, L. R. 12 Eq. 156, where one assigned to the trustees of his marriage settlement an equitable interest in certain copyholds, with a covenant for further assurance, and afterwards got himself admitted, and sold the copyholds and appropriated the purchase money, it was objected by his simple contract creditors in a suit for the administration of his estate after his death that the covenant was not broken, as there had been no demand made under it by the trustees, and that there could be no specialty debt unless there were a covenant to pay, or something equivalent, which here there was not, but the court held that the trustees were entitled to prove against the

is not bound by his ancestor's covenants unless named in them, a contrary rule prevails as to the former.[1] Nor is there any distinction between the liability of an executor upon covenants broken after the testator's death, and those broken before that event.[2]

estates as for a specialty debt. Romilly, M. R., said, "It is argued that as a deed reciting a debt does not create a specialty debt unless it contains a covenant to pay it, so the recitals here can create no debt which I assent to; but this is not that case. Then it is contended that a covenant for further assurance is merely a covenant to pay when called upon, and that the settlor was never called upon to pay, and no doubt this is true; but I think that this circumstance cannot avail him, or rather his estate in this case, inasmuch as it was the duty of the settlor, without being applied to, to transfer this sum of money to the trustees of his marriage settlement; and if I were to hold that an application is necessary to create the obligation, I should be giving advantage to a man and allow him to avoid paying a debt by fraudulently concealing an act of misconduct on his part. I think also that the cases generally tend to this result, either that the covenant is nothing, or that it created a specialty debt."

[1] "And therefore if a man bind himself by obligation or covenant to pay money, or to do any such like thing, and do not bind his executors or administrators by name, in this case the executor or administrator may be sued and may be charged as far forth as if they were named." Touchstone, 482; Bro. Abr. Covenant, pl. 12; Went. Ex. Ch. 11. Nor is this liability of the executor confined, as the above quotation might seem to imply, to mere obligations to pay money, but it extends to any "obligation, contract, debt, covenant or other duty;" Wheatley *v.* Lane, 1 Saund. 216, note; Com. Dig. Covenant, C. 1; Plumer *v.* Marchant, 3 Burr. 1380; Siboni *v.* Kirkman, 1 Mees. & Welsb. 419; Hunt's Appeal, 105 Pa. 128; except such as are of a particular personal character, of which instances may be found in 2 Williams on Executors, 1469, and Wentworth *v.* Cock, 10 Ad. & Ell. 42. It is sufficient to say that covenants for title are not included in these exceptions. Chambers *v.* Wright, 40 Mo. 482, *supra*, p. 520, n. 3, is exceptional.

[2] In Perrot *v.* Austin, Cro. Eliz. 232, it is said to have been resolved that if one covenant that his executors shall pay ten pounds, no action will lie against them, for it was no debt of the testator, and therefore could not survive. But Lord Mansfield said, in Plumer *v.* Marchant, 3 Burr. 1380, that this was an extraordinary case, and the contrary has been recently held. Randall *v.* Rigby, 4 Mees. & Welsb. 130; *Ex parte* Tindall, 8 Bing. 402. So with respect to the covenants for title; in Wells *v.* Fydell, 10 East, 315, one who had received a covenant for quiet enjoyment was evicted after the death of the covenantor, and no question seems to have been made of the liability of his executor, although the covenant had not been broken in the lifetime of the testator. The cases of Swan *v.* Stransham, Dyer, 257 *a*, Proctor *v.* Johnson, 2 Brownl. 214, Adams *v.* Gibney, 6 Bing. 656, and Andrew *v.* Pierce, 1 Bos. & Pull. 158, which might be thought authorities against this position, will on examination be found to have been decided upon another ground, *supra*, p. 341, n. 5, p. 444, n. 1. In Williams *v.* Burrell, 1 C. B. 402, which was elaborately argued, covenant was brought against executors for a breach, after the testator's death, of a warranty (there were no words of covenant, but they were those of the old warranty) entered into by him, and no question was made on the argument of the liability of the executor depending upon the breach happening before or after the testator's death; and from a remark made by Maule, J., in the course of the argument, the point seems not to have been overlooked, as he said, "Here the heir being named and the executors not, it may be contended that the latter were intended to be excluded." The case, however, was argued and decided upon other grounds, and Tindal, C. J., said, "Upon principle and authority we think this an express

§ 313. 5. *Of the Assignee.* — The liability of an assignee upon covenants for title entered into by his assignor is one which can never arise where the deed which contains the covenants conveys an estate in fee simple; as in such case the land passes at once and entirely from the possession of the vendor, who has therefore no estate to transfer to a subsequent purchaser. But the question of an assignee's liability may arise where the conveyance is of a leasehold estate, and the covenants are then held binding upon the assignee of the reversion.[1]

covenant for quiet enjoyment, and consequently that the defendants are liable thereon as executors of the covenantors." See this case, *supra*, p. 444, n. 3. In McClure *v.* Gamble, 27 Pa. 290, the court said: "This is an action on a covenant of warranty in which the grantor covenanted 'for himself and his heirs,' and it is argued that under such a covenant the executors are not bound, but the heir only. It is thought, because the grantor expressly included his heirs in the covenant, he has impliedly excluded his executors, but this does not follow, for by binding himself he binds his estate, so far as it is represented by his executors, whereas the heir could not be bound without express terms, and this accords with Williams *v.* Burrell, 1 C. B. 402. And if the heir at common law is the only one found [bound] as heir by such a covenant, the law would lean in favor of equality of contribution by preferring the action against the executors or administrators." In Hovey *v.* Newton, 11 Pick. (Mass.) 421, it was held that damages for a breach of the covenant for quiet enjoyment, which had accrued both before and after the covenantor's death, could be recovered in one and the same action against his administrator, the court saying, "The whole damage sustained by the plaintiffs from the breach of the covenant of the intestate becomes a debt against his estate, for which the defendant is answerable." And it is well settled that, in the absence of local statutes to the contrary, a covenant for quiet enjoyment, for further assurance, or of warranty, is in no respect different, as to the liability which it imposes on the executor, from any other specialty debt, as for instance a covenant to pay a certain sum of money, which though the time of payment might be subsequent to the death of the covenantor, yet would create a valid claim against his executor.

Where however, in Collins *v.* Crouch, 13 Q. B. 542, an action was brought against an executrix of an assignee upon a covenant to perform certain covenants in a lease and indemnify the assignor for the breach of any of them, the defendant pleaded *plene administravit*, and showed at the trial that the entire assets, including the consideration money, had, before the breach complained of, been applied to the payment of simple contract debts, and it was held that the executrix was not bound to retain the proceeds of such sale for the purpose of indemnifying against future breaches of covenant. See also Wyse *v.* Snow, 5 Irish Jur. 87; Wildridge *v.* McKane, 1 Molloy, 122. As upon general principles it would seem unjust to postpone the distribution of a decedent's estate because of possible future breaches of covenants for title made by him (a course which would obviously make impossible the settlement of the estate of any one who had dealt largely in real estate), it is in many States provided by statute, as it is in Pennsylvania (see Musser *v.* Oliver, 21 Pa. 362), that an executor distributing the estate under order of the court, and taking refunding bonds from the distributees, is protected from any future claims.

[1] See Thursby *v.* Plant, 1 Saund. 237, and notes. It has been held otherwise, however, where the covenant is one of indemnity merely, and assigns not named in it. Doughty *v.* Bowman, 11 Q. B. 452. In Buck *v.* Binninger, 3 Barb. (N. Y.)

Having thus considered the *liabilities*, we approach the subject of the *rights* arising under the covenants for title.

§ 314. 1. *Of the Covenantee.* — As the covenants for seisin, for right to convey and against incumbrances, are in this country, as a general rule, held to be broken as soon as they are made,[1] it follows that immediately upon the execution of the deed which purports to convey the estate, a right of action upon these covenants inures to the party who has received them, upon which his damages will be real or nominal, according to the injury which the defective title has visited upon him.[2]

It would also seem to follow that after the lapse of twenty years from the execution of the deed, the common law presumption that these covenants had been satisfied or released would arise,[3] even if they should not come within any local statutory enactment upon the subject.[4] With respect, however, to the covenants for quiet enjoyment, for further assurance, and of warranty, a statute of limitation, expressed as such statutes usually

403, it was obviously held that the purchaser of a remainder expectant upon the determination of a lease for life, in which was a covenant for quiet enjoyment, could do nothing to interfere with the enjoyment of the life estate by the tenant, and the case seems to have been put on the ground of preventing circuity of action; but the more natural reason would seem to be that the purchaser simply took the estate subject to the tenancy.

[1] See *supra*, § 205 *et seq.*

[2] *Supra*, § 176. In Ladd *v.* Noyes, 127 Mass. 151, it was obviously held that an action for breaches of covenants for title occurring before the plaintiff became the owner of the land could not be maintained. So, conversely, in Foster *v.* Woodward, 141 id. 160, it was held that one could not prove in insolvency for a breach which did not take place till after the commission in insolvency. See *supra*, p. 507, n. 4.

[3] Stewart *v.* West, 14 Pa. 338; Heath *v.* Whidden, 24 Me. 383; Jenkins *v.* Hopkins, 9 Pick. (Mass.) 544, in which last case it was held that accord and satisfaction was the proper plea upon which to rest the defence.

[4] Clark *v.* Swift, 3 Met. (Mass.) 390; Rev. Stats. of Massachusetts, c. 120, § 7; Bird *v.* Smith, 3 Eng. (Ark.) 368; Webber *v.* Webber, 6 Greenl. (Me.) 138; Pierce *v.* Johnson, 4 Verm. 255. In Missouri, however, it was held in Chambers *v.* Smith, 23 Mo. 174, that the statutory covenant for seisin implied from the words "grant, bargain, and sell" was not barred by reason of not having been presented within three years from the death of the covenantor, as that covenant was, in that State, held to run with the land. See *supra*, p. 313, n. 1. In Blondeau *v.* Sheridan, 81 id. 545, the court, referring to the statutory provision that "actions brought on any covenant of warranty . . . shall be brought within ten years next after there shall have been a final decision against the title of the covenantor," suggested that strictly construed this might enable a covenantee to extinguish the adverse title (by constructive eviction, *supra*, § 146 *et seq.*) and maintain his suit without regard to lapse of time, inasmuch as there never had been any decision on this point; but without deciding the question (which was unnecessary to the case) the court seemed to think that the statute should begin to run from the time of the extinguishment.

are, would not begin to run until there had been an actual breach, and of course the presumption would not arise until twenty years from that period.[1]

§ 315. The questions arising as to covenants being joint or several have already been noticed as respects the liabilities of the covenantors.[2] It remains to consider them with respect to the rights of the covenantees, in regard to which it may be briefly said that where the interest is joint the covenant can never be joint and several; that is, the covenantees can never have the option whether they shall sue jointly or severally, but they must sue jointly if they can; where, however, the deed shows an interest in the covenantees which is several, a covenant which is joint in form may be sued upon by one covenantee alone.[3]

[1] Heath *v.* Whidden, 24 Me. 383; Stewart *v.* West, 14 Pa. 338; 9 Jarm. Conv. 402; Crisfield *v.* Storr, 36 Md. 129.

[2] *Supra*, § 304.

[3] James *v.* Emery, 8 Taunt. 245; Withers *v.* Bircham, 3 Barn. & Cress. 254; Servante *v.* James, 10 id. 410; Story *v.* Richardson, 6 Bing. N. C. 129; Poole *v.* Hill, 6 Mees. & Welsb. 835; Palmer *v.* Sparshott, 4 Scott's New R. 743; Mills *v.* Ladbroke, 7 Man. & Grang. 218; Harrold *v.* Whittaker, 11 Q. B. 161; Sharp *v.* Conkling, 16 Verm. 355. It has been settled from an early day that all covenants, including of course covenants for title, are to be construed as joint or several, according to the interest taken by the parties to whom they are made, or in whom the right to take advantage of them has vested. Thus in Slingsby's case, 5 Rep. 18, which is generally cited as the leading authority, where the defendant granted to four, although he covenanted "with each and every of them" that he was seised in fee, yet it was held that all must join in an action on the covenant. The report says, "It appears by the plaintiffs own showing in his [their] declaration, that the plaintiffs only cannot maintain an action of covenant, but the other covenantees ought to have joined in the action with them, notwithstanding these words *et ad et cum quolibet et qualibet eorum*, for as to these words this difference was agreed: when it appears by the declaration that every of the covenantees hath or is to have a several interest or estate, there, when the covenant is made with the covenantees *et cum quolibet eorum*, these words *cum quolibet eorum* make the covenant several in respect of their several interests. As if a man by indenture demises to A. blackacre, to B. whiteacre, to C. greenacre, and covenants with them *et quolibet eorum* that he is lawful owner of all the said acres, etc., in that case, in respect of the said several interests, by the said words *et cum quolibet eorum* the covenant is made several; but if he demises to them the acres jointly, then these words *cum quolibet eorum* are void, for a man by his covenant (unless in respect of several interests) cannot make it first joint and then to make it several by the same or the like words *cum quolibet eorum*, for although sundry persons may bind themselves *et quemlibet eorum*, and so the obligation shall be joint or several at the election of the obligee, yet a man cannot bind himself to three and to each of them to make it joint or several at the election of several persons for one and the same cause, for the court would be in doubt for which of them to give judgment, which the law would not suffer." This doctrine has since been recognized in Eccleston *v.* Clipsam, 1 Saund. 153; Spencer *v.* Durant, Comb. 115; Saunders *v.* Johnson, Skin. 401; Scott *v.* Godwin, 1 Bos. & Pull. 67; Anderson *v.* Martindale, 1 East, 497; Lane *v.* Drinkwater, 1 Cromp., Mees. & Rosc.

Where the benefit of covenants for title has descended upon coparceners, all *must* join in suing upon it;[1] if it has vested in tenants in common, all *may* join in respect of their joint possession,[2]

599; Bradburne *v.* Botfield, 14 Mees. & Welsb. 559; Foley *v.* Addenbrooke, 4 Q. B. 197; Hopkinson *v.* Lee, 6 id. 964; Carthrae *v.* Browne, 3 Leigh, (Va.) 98; Comings *v.* Little, 24 Pick. (Mass.) 266, *supra*, p. 508, n. 2; Calvert *v.* Bradley, 16 How. (S. C. U. S.) 580. Mr. Preston however was of opinion (Touchstone, Preston's ed. 166) that by express words clearly showing the intention a covenant might be joint or several, notwithstanding the nature of the interest, and some *dicta* in Sorsbie *v.* Park, 12 Mees. & Welsb. 146, and Keightley *v.* Watson, 3 Exch. 713, in approval of this have been sometimes considered as having caused a difference of decision between the Exchequer and the Queen's Bench. An examination of the cases themselves will however show that there is no real conflict of authority. In Hopkinson *v.* Lee, 6 Q. B. 964, the covenant was apparently expressly framed upon the strength of the opinion expressed by Mr. Preston. The covenant was to and with Jonathan Hopkinson, his heirs, etc., "*and also a distinct covenant with and to* Ann Caroline Hogg, her heirs," etc., and Lord Denman, after referring to the often affirmed case of Anderson *v.* Martindale, 1 East, 497, said: "The language in Anderson *v.* Martindale as entirely confines the covenant to the plaintiff and makes another separate covenant with E. Wyatt as any words not directly exclusive can make it. In Slingsby's case the covenant was with certain persons named '*et ad et cum quolibet et qualibet eorum.*' No words can be stronger to give the plaintiff an option to sue all jointly or each separately. Yet in both the court held that by reason of the joint interest in the subject matter of the suit, as disclosed in the deed itself, the action must be joint. We think it would be waste of time to argue that the words 'as a distinct covenant' do not furnish any stronger inference of the intention to exclude than those just cited from those well-known cases. If they are still law the present case must be decided against the plaintiff. We see no ground for doubting whether they are."

In Bradburne *v.* Botfield, indeed, 14 Mees. & Welsb. 559, Baron Parke thus refers to the strictures by Lord Denman in Hopkinson *v.* Lee, *supra*, of the remarks made by Lord Abinger and himself in Sorsbie *v.* Park: "The Court of Queen's Bench," said the learned Baron, "in the case of Hopkinson *v.* Lee, have supposed that Lord Abinger and myself had sanctioned some doctrine at variance with the case of Anderson *v.* Martindale and Slingsby's case, which it was far from my intention, and I have no doubt from Lord Abinger's, to do, it being fully established I conceive by those cases that one and the same covenant cannot be made both joint and several with the covenantees. It may be fit to observe that a part of Mr. Preston's explanation, that by express words a covenant may be joint and several with the covenantors and covenantees, notwithstanding the interests are several, is inaccurately expressed; it is true only of covenantors, and the cases cited from Salkeld, p. 393, relate to *them;* probably Mr. Preston intended no more, and never meant to assent to the doctrine that the *same* covenant might be made by any words, however strong, joint and several, where the interest was joint; and it is this part, I apprehend, of Mr. Preston's doctrine to which the Court of Queen's Bench objects. I think it right to give this explanation, that it may not be supposed that there is any difference on this point with the Court of Queen's Bench." In Keightley *v.* Watson, *supra*, moreover, it expressly appeared on the face of the instrument that the parties had a separate interest, so that the court decided it to be a separate covenant, both in accordance with the words and the interest.

[1] Decharms *v.* Horwood, 10 Bing. 526; Tapscott *v.* Williams, 10 Ohio, 443.

[2] Midgley *v.* Lovelace, Carthew, 289; Powis *v.* Smith, 5 Barn. & Ald. 850; Henniker *v.* Turner, 4 Barn. & Cress. 157;

or each one of the tenants in common may, it seems, sue separately, at his election.[1]

Paul *v.* Witman, 3 Watts & Serg. (Pa.) 407; Lamb *v.* Danforth, 59 Maine, 322; Blondeau *v.* Sheridan, 81 Mo. 545.

[1] Midgley *v.* Lovelace, *supra;* Swett *v.* Patrick, 2 Fairf. (Me.) 181; Lamb *v.* Danforth, *supra;* Hammond on Parties, 29; Walford on Parties to Actions, 423; Broom on Parties to Actions, 27; Dicey on Parties to Actions (2d ed.), 111. The right of tenants in common in general to sue jointly or severally, depends upon the subject of the action and the interest they have in it, and the student must distinguish between cases where it is said that tenants in common *may*, and where they *must* join or sever. In Paul *v.* Witman, 3 Watts & Serg. (Pa.) 409, covenant was brought by two devisees of a testator and the heirs of a deceased devisee, and it was said: "Whether the plaintiffs can sustain a joint suit is a point not without difficulty. The contract was made with the testator, and it was unreasonable that he should be at liberty by devising the land in separate parcels to subject the warrantor to as many actions as there were devisees. Suppose the warrantor on eviction of the warrantee is ready and willing to pay, how is he to ascertain the proportion to which each of the devisees is entitled when the portions of the real estate devised are of unequal value? Is the warrantor to be liable to as many suits as there are heirs? Although as between themselves their interests are several, yet as respects the warrantor they hold a joint interest, and as such may sue jointly. Of this, as it is for his benefit, the warrantor could not complain. When a joint interest is created, either by the parties or by act of law, the covenantees cannot sever in the action. And the reason assigned is, that if several were permitted to bring distinct actions for one and the same cause when the interest is joint, the court would be in doubt for which of them to give judgment. Slingsby's case, 5 Rep. 19; 1 East, 500. That all the heirs should join in the suit is but justice to them as well as the covenantor, for they are equally entitled to the money. Devisees may apportion the money between themselves, and why compel them to bring separate suits when it is to their advantage as well as the warrantors' that the suit should be joint? Whether separate suits will not lie may perhaps be doubtful, since the decision of Twynam *v.* Pickard, 2 Barn. & Ald. 105. In that case it is ruled that covenant will lie by the assignee of the reversion of part of the demised premises against the lessor for not repairing." In the subsequent case of McClure *v.* Gamble, 27 Pa. 288, the title which the covenant was intended to assure became vested in a tenant for life, with remainder over, and the tenant for life, being evicted, brought covenant. It was objected that the title and the covenant were single, and that all those entitled to the remedy upon it must join in the action. "We regard this objection as sound," said the court, "and as receiving support from the reasoning of Mr. Justice Rogers in the case of Paul *v.* Witman, though in that case it was decided only that different owners *may* properly join. Regarding the tenant for life and the remaindermen as entitled, as against the covenantor, to one seisin and property divided as among themselves into different periods, we think that the action on the covenant given to secure that seisin ought to be single, otherwise the covenantor, not being able to set up the judgment of one against the other claimants, might have to pay to all much more than is required by his covenant — might be subjected to innumerable actions for a single breach of the same covenant. It may be, however, that alienors of different parcels of the land would be allowed to sue severally for the parts from which they have been respectively evicted." And this was approved in the somewhat recent case of Crisfield *v.* Storr, 36 Md. 148. In Lawrence *v.* Montgomery, 37 Cal. 183, one conveyed to tenants in common with a covenant that he had not sold nor incumbered the land, which was held to be broken as soon as made, and therefore did not pass with the release by one of them to the other; the cause of action accrued jointly.

§ 316. 2 and 3. *Of the Heir and Devisee.* — It has been seen that the *liability* of an heir depended, among other things, upon his being named in the covenant.[1] In the case of the ancient warranty, the same rule was applied as respects the *right* of the heir to sue. Unless named in the warranty, he could not take advantage of it.[2] But with respect to covenants, this rule has been sought to be altered, and the conclusion seems to have been arrived at, that where from the instrument the intention appears that a covenant in its nature capable of running with land should continue in operation longer than for the life of the covenantee, advantage may be taken of it by the heir, although not named in terms;[3] and it has been further suggested that such covenants might, in general, be construed to run with an estate of inheritance to the heir, unless an evident intention be manifested to confine them to the covenantee.[4]

The right, however, of an heir to take advantage of the covenants for title which his ancestor has received, depends, throughout the greater part of this country, upon the nature of those covenants, as it has been seen in a former chapter that the covenants for seisin, for right to convey, and against incumbrances are held to be broken as soon as made, and thereby turned into *choses in action*, incapable of transmission or assignment.[5] A suit upon these covenants can therefore only be maintained by the personal representative of the covenantee. Hence it has been somewhat generally said that these covenants do not run with the land; but as thus stated the proposition is scarcely accurate, as all the covenants for title run with the land until breach, and the difference between the American and the English authorities is, that according to the former, the covenants for seisin, for right to convey, and against incumbrances are held to be broken as soon as made; while according to the latter, no distinction is taken between these covenants and those for quiet enjoyment and of warranty, which, on both sides of the Atlantic, are held to be prospective in their operation, and not to be broken until eviction.[6]

[1] *Supra*, p. 515.

[2] Co. Litt. 384 *b*; *supra*, p. 293, n. 2.

[3] Lougher *v.* Williams, 2 Lev. 92; Sacheverell *v.* Froggatt, 2 Saund. 367; Platt on Covenants, 517. And see the argument of Mr. Gifford in the case of Kingdon *v.* Nottle, 1 Maule & Selw. 357; 4 id. 53.

[4] Roe *v.* Hayley, 12 East, 464.

[5] *Supra*, p. 205 *et seq.*

[6] *Supra*, p. 291, n. 1. As to what may constitute an eviction, see *supra*, § 131.

But the right of the heir or devisee to take advantage of these last-named covenants depends entirely upon whether their breach did or did not occur in the lifetime of the ancestor or testator. Although from some expressions in the cases of Kingdon *v.* Nottle [1] and King *v.* Jones,[2] it would seem to have been thought that the modern covenants for title, like the ancient warranty, descended as to their benefit upon the heir, irrespective of the time at which the breach took place, yet such a doctrine has been since corrected,[3] and it is now well settled that where the breach occurs in the lifetime of the ancestor or testator, the right to recover the consequent damages vests in his personal representative; and where a covenant of warranty was made to two tenants in common, both of whom were evicted, and one of them afterwards died, it was held that the right survived, and that the action was rightly brought by the other covenantee for the whole damage sustained.[4] Where, however, the breach occurs after the death of the ancestor or testator, the right of action must be exercised by the heir or devisee, on whom the damage has fallen.[5] If, however, the heir or devisee be at that time dead, the right of action vests in his personal representatives, the damages being, of course, personal estate.[6]

§ 317. 4. The foregoing remarks, and those that have been made in a former chapter, may be also referred to in considering the rights of *the executor or administrator*. They are entitled to the benefit of the covenants for title which could have been taken advantage of by the testator or intestate during his lifetime, and which were broken before his death.[7]

§ 318. 5. As respects the rights of the *assignee*, a distinction always existed between warranty and the covenants for title. Thus the warranty implied by the word *dedi* could not be taken

[1] 1 Maule & Selw. 355. See *supra*, p. 306, n. 2.

[2] 5 Taunt. 418; *supra*, § 206.

[3] See Raymond *v.* Fitch, 2 Cr. M. & Rosc. 588; Ricketts *v.* Weaver, 12 Mees. & Welsb. 718; Walford on Parties to Actions, 368. In Young *v.* Raincock, 7 C. B. 310, which was elaborately argued, the eviction having taken place during the lifetime of the purchaser, no objection was taken to the action having been brought by his executor. If the point had been considered as at all an open one, of course the objection would have been made. See this case, *supra*, p. 484, n. 1.

[4] Townsend *v.* Morris, 6 Cow. (N. Y.) 123.

[5] Tapscott *v.* Williams, 10 Ohio, 442; Grist *v.* Hodges, 3 Dev. (N. C.) 201; South *v.* Hoy, 3 Mon. (Ky.) 95; Pence *v.* Duvall, 9 B. Mon. (Ky.) 48; Williams *v.* Hogan, Meigs, (Tenn.) 187.

[6] Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120.

[7] Unless in such a case as that of Townsend *v.* Morris, *supra*.

advantage of by the assignee of him who had received it;[1] but "if a man make a lease for years by the word *concessi* or *demisi* (which implies a covenant), if the assignee of the lessee be evicted, he shall have a writ of covenant."[2]

So with respect to the warranty and the covenant when expressed in words: "Regularly," says Coke,[3] "if a man warrant land to another and his heirs without naming assigns, his assignee shall not vouch;" but with respect to a covenant, the rule was different, and the assignee could take advantage of it though not named.[4] The right however of an assignee to take advantage of covenants entered into with one prior to himself in the chain of title, depends upon many circumstances, which it has been attempted to explain in a former chapter.[5]

[1] "If a man make a feoffment by this word *dedi*, which implies a warranty, the assignee of the feoffee shall not vouch." Spencer's case, 5 Rep. 16. And see *supra*, Ch. X.

[2] Spencer's case, 4th resolution: "For the lessee and his assignee hath the yearly profits of the land, which shall grow by his labor and industry, for an annual rent; and therefore it is reasonable when he hath applied his labor and employed his cost upon the land and be evicted (whereby he loses all), that he shall take such benefit of the demise and grant as the first lessee might, and the lessor hath no other prejudice than what his especial contract with the first lessee hath bound him to."

[3] Co. Litt. 384 *b*.

[4] Spencer's case, 5 Rep. 16.

[5] See *supra*, Ch. X.

CHAPTER XIV.

THE PURCHASER'S RIGHT AT LAW TO RECOVER BACK OR DETAIN THE PURCHASE MONEY AFTER THE EXECUTION OF THE DEED.

§ 319. The distinctions between the rules which govern the relation of vendor and purchaser before and after the execution of the deed — while the contract is still executory, and after it is executed — are broad and familiar. Although the general principles of the contract of sale of real estate, both in this country and in England, exact less from the vendor than the rules of the civil law demand,[1] yet, while the contract is still executory, they recognize and enforce the right of the purchaser to a title clear of defects and incumbrances, and this right does not depend upon the terms of the contract, but is given by the law;[2] and is not, except in particular cases, affected by the nature and extent of the covenants for title which the purchaser is to receive.[3]

[1] Much objection is made by the admirers of the civil law to the doctrine of *caveat emptor*, as applied to real estate (Cooper's Justinian, 610, 620, *et seq.*); but as was said by Lord Eldon, "No one in his senses would take an offer of a purchase from a man merely because he stood upon the ground." Hiern *v.* Mill, 13 Ves. 114. "In contracts of purchase, the vendor and vendee, in the absence of special circumstances, are to be considered as acting at arm's length; and hence although the vendor will not be allowed to practise any artifice for the purpose of concealing defects or to make such representations as may have the effect of throwing the purchaser off his guard, yet on the other hand where the means of information as to the facts and circumstances affecting the value of the subject of sale are equally accessible to both parties, and neither of them does or says anything to impose upon the other, the disclosure of any superior knowledge which one party may have over the other is not requisite to the validity of the contract; there being no breach of any implied confidence that either party will not avail himself of his superior knowledge, because neither party reposes such confidence unless specially tendered or required." Atkinson on Marketable Titles, 134.

[2] See *supra*, p. 42.

[3] The exceptions to this proposition are perhaps peculiar ones, as where a purchaser makes a chancing bargain and relies on the covenants he is to receive for his protection. Sugden says, "If a purchaser before executing the articles has notice of an incumbrance *which is contingent*, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him; and he cannot therefore detain any part of the pur-

§ 320. But when the contract has been consummated by delivery of the deed, a different rule comes in.[1] Any inconsistencies between the terms of the contract and the terms of the deed are then, as a rule, to be governed solely by the latter, into which the former are merged,[2] and the purchaser's only right to relief from defects or incumbrances, whether at law or in equity, depends, in the absence of fraud, solely upon the covenants for title which he has received.[3]

§ 321. The connection therefore between the covenants for title and the purchaser's right to relief is, on both sides of the Atlantic, a necessary and intimate one.[4] This has been settled by a series of decisions from an early day. In the first case which Coke reports, it was held that if one seised in fee convey without warranty, "the title papers pass to the grantee, because he has to defend the land at his peril."[5] The leading authority, however, is Maynard's case,[6] where Lord Nottingham said, "He that purchases lands without any covenants or warranties against prior titles, if the lands be afterwards evicted by an *eigne* title can never exhibit a bill in equity to have his purchase money again upon that account; possibly there may be equity to stop the payment of such purchase money as is behind, but never to recover what is paid; for the chancery mends no man's bargain, though it sometimes mends his assurance."[7] But even this suggested right of the purchaser to

chase money." Sugd. on Vend. (14th ed.) p. 549. Vane *v.* Lord Barnard, Gilbert's Eq. R. 5 (*supra*, p. 87, n. 1), which is the authority cited, was not strictly a case of vendor and purchaser; it arose under a marriage settlement.

[1] The distinction is a familiar one, and there are many cases in which equity would have refused to decree a specific performance of the contract, yet which, being executed, it will refuse to disturb. Dart on Vendors (5th ed.), 734; Story's Eq. Jur. §§ 206, 693.

[2] Howes *v.* Barker, 3 Johns. (N. Y.) 506; Houghtaling *v.* Lewis, 10 id. 297; Griffith *v.* Kempshall, 1 Clark's Ch. (N. Y.) 571; Bull *v.* Willard, 9 Barb. S. C. (N. Y.) 642; Seitzinger *v.* Weaver, 1 Rawle, (Pa.) 377; Ludwick *v.* Huntzinger, 5 Watts & Serg. (Pa.) 51; Shontz *v.* Brown, 27 Pa. 131; Coleman *v.* Hart, 25 Ind. 256. Except in some cases, when certain collateral and incidental covenants are not merged in the deed. Colvin *v.* Schell, 1 Grant, (Pa.) 226; Cox *v.* Henry, 32 Pa. 20; Carr *v.* Roach, 2 Duer, (N. Y.) 25.

[3] Gibson *v.* Richart, 83 Ind. 313; Fritz *v.* McGill, 31 Minn. 536.

[4] Except in Pennsylvania, where, as will be hereafter shown, even after the execution of the deed, the contract is still executory as to such part of the purchase money as is unpaid, and the absence or presence of covenants which include the defect is less material.

[5] Buckhurst's case, 1 Rep. 1; Redwine *v.* Brown, 10 Ga. 311; Hodges *v.* Saunders, 17 Pick. (Mass.) 475.

[6] 2 Freem. 1; s. c. Rep. temp. Finch, 288 (A. D. 1676), also found in Appendix to 3 Swanst. 651, 653, *nom.* Maynard *v.* Moseley.

[7] This was after a reargument. On the first hearing of the case, the Chancellor

detain the purchase money has long since been denied, and it is one of the most settled doctrines of the law that a purchaser who has received no covenants which cover the defect or incumbrance can neither detain the purchase money nor recover it back if already paid. Unless there has been fraud or mistake, he is absolutely without relief against his vendor, either at law or in equity.[1]

said, "Shall the loss fall upon the defendant when he hath sold without any covenants or warrantees, and without any other conditions than what are performed? *Caveat emptor* is a very needless advice, if the Chancery can establish another rule instead of it by declaring that equity must suffer no man to have an ill bargain." 3 Swanst. 653.

[1] Urmston *v.* Pate (1794), reported in 4 Cruise, 394 (4th ed.), and Sugden on Vendors, cited by Lord Loughborough in Wakeman *v.* Duchess of Rutland, 3 Ves. 235; Craig *v.* Hopkins, 2 Coll. of Decis. 517; Co. Litt. 384 *a*, note; Thomas *v.* Powell, 2 Cox's Ch. 394; Bree *v.* Holbech, Doug. 655. (This was a strong case. An administrator with the will annexed found a mortgage among the papers of his testator, and assigned it for full value, covenanting that neither the testator nor himself had done any act to incumber the mortgaged estate. The mortgage turned out to have been forged (but not by the testator); but as there was no evidence that the administrator knew of the forgery, Lord Mansfield held that the purchaser could not recover back what he had paid. The administrator "did not covenant for the goodness of the title, but only that neither he nor the testator had incumbered the estate. It was incumbent on the plaintiff to look to the goodness of it." This case, though recognized as correct in this application, must not be extended beyond it. See Price *v.* Neale, 3 Burr. 1355; Cripps *v.* Read, 6 Term, 606; Jones *v.* Ryde, 5 Taunt. 488; Smith *v.* Mercer, 6 id. 76; Young *v.* Adams, 6 Mass. 182; U. S. Bank *v.* Bank of Georgia, 10 Wheat. (S. C. U. S.) 433.) Johnson *v.* Johnson, 3 Bos. & Pull. 162; Corbitt *v.* Dawkins, 54 Ala. 282; Alexander *v.* McAuley, 22 Ark. 553; Peabody *v.* Phelps, 9 Cal. 213; Reese *v.* Gordon, 19 id. 147; Hastings *v.* O'Donnell, 40 id. 198; McDonald *v.* Beall, 55 Ga. 288; Leland *v.* Isenbeck, 1 Idaho, (N. S.) 471; Doyle *v.* Knapp, 3 Scam. (Ill.) 334; Condrey *v.* West, 11 Ill. 146; Niles *v.* Harmon, 80 id. 401; Laughery *v.* McLean, 14 Ind. 108; Small *v.* Reeves, id. 164; Johnson *v.* Houghton, 19 id. 361; Starkey *v.* Neese, 30 id. 224; Brandt *v.* Foster, 5 Clarke, (Io.) 293; Allen *v.* Pegram, 16 Io. 172; Wightman *v.* Spofford, 56 id. 145; Butler *v.* Miller, 15 B. Mon. (Ky.) 627; Cannon *v.* White, 16 La. An. 89; Soper *v.* Stevens, 14 Me. 133; Butman *v.* Hussey, 30 id. 266; Middlekauff *v.* Barrick, 4 Gill, (Md.) 300; Falconer *v.* Clark, 3 Md. Ch. Dec. 151 (s. c., 7 Md. 178); Harris *v.* Morris, 4 Md. Ch. Dec. 530; Earle *v.* De Witt, 6 Allen, (Mass.) 526; Williamson *v.* Raney, 1 Freem. Ch. (Miss.) 114; Allen *v.* Hopson, id. 276; Earle *v.* Earle, Spencer, (N. J.) 363; Frost *v.* Raymond, 2 Caines, (N. Y.) 192; Abbott *v.* Allen, 2 Johns. Ch. (N. Y.) 519; Governeur *v.* Elmendorf, 5 id. 79; Carr *v.* Roach, 2 Duer, (N. Y.) 20; Burwell *v.* Jackson, 5 Seld. (N. Y.) 535; Whittemore *v.* Farrington, 76 N. Y. 452; Nance *v.* Elliott, 3 Ired. Eq. (N. C.) 408; Miles *v.* Williamson, 24 Pa. 142; Maney *v.* Porter, 3 Humph. (Tenn.) 347; Lowry *v.* Brown, 1 Cold. (Tenn.) 457; Prigmore *v.* Sheldon, 9 Tenn. 563; Beale *v.* Sieveley, 8 Leigh, (Va.) 658; Commonwealth *v.* McClanachan, 4 Rand. (Va.) 482; Sutton *v.* Sutton, 7 Grat. (Va.) 238.

"In the ordinary case of a sale of land," said Mason, J., in Platt *v.* Gilchrist, 3 Sandf. S. C. (N. Y.) 118, "the possibility that the title may fail is a consideration that enters into the views of both purchaser and seller. If the purchaser does not wish to assume the risk of the

§ 322. But as fraud vitiates all it touches, the exception is most important. Where there has been fraudulent concealment or misrepresentation, the fact that the contract has been executed by the delivery of the deed does not deprive the purchaser of his right to relief, nor is it material whether the covenants for title do or do not extend to the particular defect or incumbrance.[1]

But while this general principle is well settled, some difficulty has been experienced in modern times as to what degree of concealment or misrepresentation on the part of the vendor will amount to fraud, and in a series of important cases in England the subject has received elaborate examination.

The leading case in which the doctrine was distinctly laid down may be said to be Edwards *v.* McLeay,[2] where the purchaser having discovered, after the receipt of his deed, that the ground of

title, he protects himself by covenants. If he assumes the risk, he accepts the deed without covenants, and receives his equivalent in the diminution of the price. When the very thing occurs the hazard of which he has taken on himself, and for which he has received an equivalent, it would be anything but equitable to restrain the collection of the unpaid purchase money. It would be throwing upon the seller the very loss which he had declined to assume, and be making him, contrary to the intention of the parties, the guarantor of the title, at least to the extent of the sum due." And see this case *infra*, Ch. XV.

There is a single case, said to have been decided by Lord Nottingham, which has laid down a different doctrine. In an anonymous case, in 2 Cas. in Ch. 19, the Chancellor is *said* to have relieved from payment of the purchase money, when the purchaser was evicted by a title to which his covenants did not extend. But the case was not only not taken down by the reporter (nor included in the valuable MS. cases preserved by the Chancellor himself, see Appendix to 3 Swanston), but he thus questions its accuracy and soundness : —

"1. If declaration, at the time of the purchase treated on, that there was an agreement to extend against all incumbrances, not only special, it could not have been admitted.

"2. The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared that the vendor was not to warrant but against himself, and the vendee to pay, because absolute without condition.

"3. *Quære.* If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase, is weary of the bargain, or in other respects sets up a title to a stranger by collusion ?

"*Nota.* In many cases it may easily be done," etc.

"If," says Sugden, "this case were law, the consequences would be serious, for what vendor would permit part of the purchase money to remain on mortgage of the estate, if he were liable to lose it, supposing the estate to be recovered by a person against whose acts he had not covenanted ?" Sugd. on Vend. (14th ed.) p. 552.

[1] Diggs *v.* Kirby, 40 Ark. 420. And the refusal of the vendor to give covenants for title will not affect the right of recovery. "If the purchaser consents to waive the usual covenants, he is none the less entitled to the exercise of good faith and honesty on the part of the vendor." Haight *v.* Hayt, 19 N. Y. 474.

[2] Coop. 308.

his stables and also of a driving-way leading up to the house were part of a common, filed a bill to rescind the contract and recover back the purchase money, with interest and all the sums spent in repairs, and proved that the defendants were aware of these facts at the time of the contract, that they were not disclosed by the abstract or otherwise, and that the vendors represented themselves to be seised in fee of the whole estate. Sir W. Grant, M. R., in delivering the opinion, said: "This is a bill of rather an unusual description. It is brought by the purchaser of an estate, who has had a conveyance made to him, for the purpose of setting aside the sale and getting back his purchase money on the ground of an alleged misrepresentation with regard to the title of a part of such estate. It certainly cannot be contended that by the law of this country the insufficiency of a title, even when producing actual eviction, necessarily furnishes a ground for claiming restitution of the purchase money. By the civil law it was otherwise. By our law a vendor is in general liable only to the extent of his covenants; but it has never been laid down that on the subject of title there can be no such misrepresentation as will give the purchaser a right to claim a relief to which the covenants do not extend.[1] . . . Whether it would be a fraud to offer, as good, a title which the vendor knows to be defective in point of law, it is not necessary to determine, but if he knows and conceals a fact material to the validity of the title, I am not aware of any principle on which relief can be refused to the purchaser. . . . The only other objection which the defendants make to the relief sought by the bill is that the purchaser is premature in his application, inasmuch as he has not yet been evicted and may perhaps never be evicted. But I apprehend that a court of equity has quite ground enough to act upon, and that it ought now to relieve the plaintiff from the consequences of the fraud practised upon him." Upon appeal from this decision,[2] Lord Eldon said that the case resolved itself

[1] The Master of the Rolls went on to say: "In the case of Urmston *v.* Pate, 4 Cruise on Real Prop. 394, there was no ingredient of fraud. Both parties misapprehended the law. The vendor had no knowledge of any fact which he withheld from the purchaser. In the case of Bree *v.* Holbech, Doug. 654 [*supra*, p. 536, n. 1], it did not at all appear that the administrator knew that the mortgage which he assigned was a forgery. Lord Mansfield says, 'if he had discovered the forgery, and had then got rid of the deed as a true security, the case would have been very different.' And the purchaser had leave to amend his replication if, upon inquiry, the case would support a charge of fraud."

[2] 2 Swanst. 308.

into the question whether the representation made to the plaintiff was not, in the sense in which we use the term, fraudulent. He was not apprised of any such decision,[1] but he agreed with the Master of the Rolls, that if one party make a representation which he knows to be false, but the falsehood of which the other party has no means of knowing, a court of equity will rescind the contract; and the decree was therefore affirmed.[2]

This was followed by the great case of Small *v.* Attwood,[3] origi-

[1] Lord Devon said of this remark, in the great case of Small *v.* Attwood, when in the House of Lords (see *infra*): "The expression of Lord Eldon, that he was not apprised of any such decision, is not immaterial. I do not refer to it as implying any doubt whatever of the jurisdiction, but when a judge of Lord Eldon's experience states himself not to be aware of any case in which that jurisdiction had been practically applied, we may find an additional reason for the principle that nothing but the most clear and decisive proof of fraudulent representations, made under such circumstances as show that the contract was based upon them — such a case indeed as Lord Eldon in his experience had not known to occur — will justify the interference of a court of equity."

[2] Though with some modification as to its extent, "as," said the Chancellor, "it seems to have gone too far on the subject of repairs and improvements. Its terms must be made conformable to the terms of the bill; striking out the word 'improvements,' and leaving the word 'repairs.' I give the plaintiff all that he asked by his bill, and I cannot give him less."

In Sugden's "Law of Property as administered in the House of Lords," p. 653, he says, in speaking of this case: "Lord Eldon's statement of what he considered to be the principle of the decree cannot alter the facts of the case, and his own previous observation shows that he did not consider it a case of moral fraud, but one where, in the sense in which a court of equity uses the term, the representation was fraudulent. And such appears to be the real nature of the case. . . . The evidence of knowledge was, I think, quite sufficient to support the decree; but it also proved that the sellers *bona fide* believed themselves to have a good title after so long a possession; and indeed the title was one which it was highly improbable would ever be impeached. Sir W. Grant's position was, that if a vendor knows and conceals a fact material to the validity of the title, relief is to be afforded to the purchaser. That is the true rule. If the title is fairly before the purchaser, he must rely on his covenants. This rule does not require any representation. If the seller knows a material fact and conceals it, that is, does not divulge it, he is responsible; his motive is unimportant; he is bound to give the purchaser the means of forming a judgment on the title, and is not to decide what he deems it necessary to disclose. Sir W. Grant did not, like the bill, put the case as one of gross fraud, although evidently, in the sense referred to by Lord Eldon, he declared the contract and conveyance to be fraudulent and void." This case of Edwards *v.* McLeay has been constantly cited as of the highest authority. Attwood *v.* Small, *infra*; Gibson *v.* D'Este, 2 Younge & Coll. (N. S.) 542; Wilde *v.* Gibson, 1 Cl. & Fin. (N. S.) 605 (where Lord Campbell said there was no case of higher authority in the books); Young *v.* Harris, 2 Ala. 111; Van Lew *v.* Parr, 2 Rich. Eq. (S. C.) 338; Gans *v.* Renshaw, 2 Pa. 34.

[3] In its day, this case was, in the House of Lords, said to be "without any example within the experience of the oldest man in the profession, in point of length and of complexity of detail, or of the mass of matter with which it stands incumbered, and it is hardly exceeded by any cause of which there is any report in respect of the importance of the stake at issue."

nally decided on the equity side of the Court of Exchequer in 1832,[1] and on appeal in the House of Lords in 1838.[2] There was little difference in opinion as to the rule of law, either in the Exchequer or in the House of Lords, although the decree in the former, rescinding the contract, was reversed in the latter, the facts not being thought sufficient to support the charge of fraud.[3] Lord Brougham, in delivering his judgment, said: "If two parties enter into a contract, and if one of them, for the purpose of inducing the other to contract with him, shall state that which is not true in point of fact, which he knew at the time that he stated it not to be true, and if upon that statement of what is not true, and what is known by the party making it to be false, the contract is entered into by the other party, then generally speaking, and unless there is more than that in the case, there will be at law an action open to the party entering into such contract, an action of damages grounded upon the deceit, and there will be a relief in equity to the same party to escape from the contract which he has so been inveigled into making by the false representation of

The amount of the purchase money was large, the costs and counsel fees were proportionate, and the hearing, first and last, occupied a greater number of hours than did the trial of Warren Hastings.

[1] 1 Younge, 461.

[2] 6 Cl. & Fin. 232, 531.

[3] The general features of the case were these: Attwood was the owner of certain iron works, and Small and others represented the British Iron Company. Upon a proposition of sale being made to the latter, Taylor, an agent and large shareholder, viewed the works while Attwood was there, and upon his report three of the directors wrote to Attwood proposing to buy the property for £600,000, payable by instalments, upon the understanding that every facility should be given to Taylor to ascertain the correctness of the representations that had been made to him. These directors subsequently examined for themselves, and then reported to the company that they had concluded the treaty of purchase after the nature and capacity of the works had been fully investigated. Soon after, Taylor went there to reside as manager, and sent favorable reports to the company. Some negotiations ensued respecting the completion of the title, pending which the price of iron fell, and the company then proposed as a new term that a deputation should go to the works to examine whether certain data given by Attwood to Taylor were correct. The visit was paid; and after communication with Taylor — who stated that although the calculations submitted to him by Attwood were too close to estimate profits upon with safety, still that they proved the data given by Attwood to be more favorable to the buyer than the seller — the directors reported that Attwood had redeemed his pledge, and the contract was executed with some abatement in the price. Six months after, the company filed a bill to rescind the contract on the ground of false statements made in papers submitted to Taylor, misrepresentations to the deputation, and concealment of faults. All these were denied by the answer, which declared that the representations were upon certain assumptions, and were general averages. The plaintiffs then amended their bill by striking out Taylor as a plaintiff and making him defendant, who in his answer denied all fraud and collusion with Attwood.

the other contracting party. In one case, it is not necessary that all those three circumstances should concur in order to ground an action for damages at law, or a claim for relief in a court of equity; I mean in the case of warranty given, in which the party undertakes that it shall in point of fact be so, and in which case, therefore, no question can be raised upon the *scienter*, upon the fraud or wilful misrepresentation. In this case that is clearly out of the question; therefore all these circumstances must combine: first, that the representation was contrary to the fact; secondly, that the party making it knew it to be contrary to the fact;[1] and thirdly and chiefly, in my view of the case, that it

[1] This proposition, though correct as stated in this application, must not be taken too broadly, or there will appear to be a conflict of authority which does not really exist. There can be no doubt that in most cases in which an action in the nature of a writ of deceit would lie at law, equity will lend its jurisdiction to rescind the contract, but the converse by no means universally holds, for the heads of fraud and mistake are, both in courts of law and equity, as distinct as those of tort and contract. An *innocent* misrepresentation by mistake can never be made the ground of a personal action for fraud (which was cited approvingly in Fairbault *v.* Sater, 13 Minn. 231, and Brooks *v.* Hamilton, 15 id. 33), however it may operate upon the contract itself. It may annul the contract, on the ground that "a substantial error between the parties concerning the subject matter of the contract destroys the consent necessary to its validity." 2 Kent's Comm. 471. And this principle has been frequently applied in equity in the rescission of executed contracts for the sale of real estate. 1 Story's Eq. § 142; Hitchcock *v.* Giddings, 4 Price, 135; Mead *v.* Johnson, 3 Conn. 597; Smith *v.* Mitchell, 6 Ga. 458; Bradley *v.* Chase, 22 Me. 511; Davis *v.* Heard, 44 Miss. 51; Dale *v.* Rosevelt, 5 Johns. Ch. (N. Y.) 182; Champlin *v.* Laytin, 6 Paige, (N. Y.) 197; Armstead *v.* Hundley, 7 Grat. (Va.) 64 (see Sutton *v.* Sutton, id. 239); Daniel *v.* Mitchell, 1 Story, (C. C. U. S.) 172; Mason *v.* Crosby, 1 Woodb. & Min. (C. C. U. S.) 342.

After some difference of opinion between the Courts of Exchequer and Queen's Bench, it is now decisively settled in England that in order to support an action on the case for fraudulent representations it is not sufficient to show that a party made statements which he did not know to be true, and which were in fact false — there must be fraud as distinguished from mere mistake. Collins *v.* Evans, 5 Q. B. 804; Barley *v.* Walford, 9 id. 197; Moens *v.* Heyworth, 10 Mees. & Welsb. 147; Taylor *v.* Ashton, 11 id. 401; Ormrod *v.* Huth, 14 id. 651; Smith *v.* Chadwick, L. R. 20 Ch. Div. 27, per Jessel, M. R. And the weight of American authority is to the same effect. Hammatt *v.* Emerson, 27 Me. 309; Tryon *v.* Whitmarsh, 1 Met. (Mass.) 1; Lord *v.* Colley, 6 N. H. 99; Young *v.* Covell, 8 Johns. (N. Y.) 25; Allen *v.* Addington, 7 Wend. (N. Y.) 10; s. c. 11 id. 375; Weeks *v.* Burton, 7 Verm. 67; Ewins *v.* Calhoun, id. 79; Smith *v.* Babcock, 2 Woodb. & Min. (C. C. U. S.) 246; Russell *v.* Clark, 7 Cranch, (S. C. U. S.) 69; Lord *v.* Goddard, 13 How. (S. C. U. S.) 211.

Without, however, the utterance of an actual falsehood, a party may still be liable in an action for deceit; as where he states material facts *as of his own knowledge* (and not as mere matter of opinion or general assertion) about which he has no knowledge whatever; as this direct wilful statement in ignorance of the truth is the same as the statement of a known falsehood, and will constitute a *scienter*. Kerr on Fraud, 19; Munroe *v.* Pritchett, 16

should be this false representation which gave rise to the contracting of the other party." [1]

Ala. 785 ; Waters *v.* Mattingley, 1 Bibb, (Ky.) 244 ; Thomas *v.* McCann, 4 B. Mon. (Ky.) 601 ; Hammatt *v.* Emerson, 27 Me. 309 ; Hazard *v.* Irwin, 18 Pick. (Mass.) 96 ; Lobdell *v.* Baker, 1 Met. (Mass.) 193 ; s. c. 3 id. 469 ; Stone *v.* Denny, 4 id. 158 ; Medbury *v.* Watson, 6 id. 246 ; Gough *v.* St. John, 16 Wend. (N. Y.) 646 ; Cabot *v.* Christie, 42 Verm. 121 ; M'Ferran *v.* Taylor, 3 Cranch, (S. C. U. S.) 281. And the same circumstances will, of course, induce equity to rescind the contract. Lanier *v.* Hill, 25 Ala. 558 ; Lockridge *v.* Foster, 4 Scam. (Ill.) 570 ; Shackelford *v.* Handley, 1 Marsh. (Ky.) 500 ; Joice *v.* Taylor, 6 Gill & Johns. (Md.) 58 ; Rimer *v.* Dugan, 39 Miss. 482 ; Turnbull *v.* Gadsden, 2 Strob. Eq. (S. C.) 14 ; Smith *v.* Babcock, 2 Woodb. & Min. (C. C. U. S.) 246 ; Tuthill *v.* Babcock, id. 298 ; Smith *v.* Richards, 13 Pet. (S. C. U. S.) 26.

[1] This has been often recognized by American authority. Foster *v.* Kennedy, 38 Ala. 362 ; Board of Commissioners *v.* Younger, 29 Cal. 177 ; Crittenden *v.* Craig, 2 Bibb, (Ky.) 474 ; Shackelford *v.* Handley, 1 Marsh. (Ky.) 500 ; Winston *v.* Gwathmey, 8 B. Mon. (Ky.) 23 ; Brown *v.* Manning, 3 Minn. 36 ; Parham *v.* Randolph, 4 How. (Miss.) 435 ; English *v.* Benedict, 25 Miss. 167 ; Oswald *v.* McGehee, 28 id. 340 ; Davis *v.* Heard, 44 id. 54 ; Concord Bank *v.* Gregg, 14 N. H. 331 ; Turnbull *v.* Gadsden, 2 Strob. Eq. (S. C.) 14 ; Warner *v.* Daniels, 1 Woodb. & Min. (C. C. U. S.) 90 ; Mason *v.* Crosby, id. 342 ; Tuthill *v.* Babcock, 2 id. 298 ; and see the remarks of Marshall, C. J., at the close of the decision in M'Ferran *v.* Taylor, 3 Cranch, (S. C. U. S.) 282. In the absence, however, of evidence on this point, it is presumed that a court of equity would be apt to conclude that if the misrepresentation were made, it had its effect to lead on the purchaser to complete the contract. Kelly *v.* Riley, 22 W. Va. 247.

Lord Brougham added that the inference he drew from the authorities was that "general fraudulent conduct signifies nothing, that general dishonesty of purpose signifies nothing, that attempts to overreach go for nothing, that an intention and design to deceive may go for nothing ; unless all this dishonesty of purpose, all this fraud, all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, even between persons of very strict morality, that could stand. [See the remarks of Lord Thurlow in the familiar case of Fox *v.* Mackreth, 2 Bro. Ch. 420, 1 Lead. Cas. in Eq., and of Lord Eldon in Turner *v.* Harvey, 1 Jac. Ch. 178 ; Pothier de Vente, n. 295, 334.] We generally find the case to be that there has been an attempt of the one party to overreach the other, and of the other to overreach the first, but that does not make void the contract. It must be shown that the attempt was made, and made with success, *cum fructu*. The party must not only have been minded to overreach, but he must actually have overreached. He must not only have given instructions to the agent to deceive, but the agent must, in the fulfilment of his directions, have made a representation ; and, moreover, the representation so made must have had the effect of deceiving the purchaser ; and, moreover, the purchaser must have trusted to that representation and not to his own acumen, not to his own perspicuity, and not to inquiries of his own. I will not say that the two might not be mixed up together — the false representation of the seller and the inquiries of the buyer — in such a way as even then to give a right to relief."

These remarks are fully borne out by decisions on this side of the Atlantic. Thus in Donelson *v.* Weakley, 3 Yerg. (Tenn.) 178, it was held that mere statements by the seller of what the property would thereafter be worth afforded no ground for rescission, it being no part of

Although the decision in this case in the court below was reversed,[1] yet, as has been already remarked, there was no

the contract, and the matter being one fully within the purchaser's own calculation; and the law was held the same way in Strong *v.* Peters, 2 Root, (Conn.) 93; Tindall *v.* Harkinson, 19 Ga. 448; Bell *v.* Henderson, 6 How. (Miss.) 311. So of vague general representations as to matters open to the examination of all. Foley *v.* Cowgill, 5 Blackf. (Ind.) 18; see Dart on Vendors (5th ed.), 90; Anderson *v.* Burnett, 5 How. (Miss.) 165; Bell *v.* Henderson, *supra;* Anderson *v.* Hill, 12 Sm. & Marsh. (Miss.) 683; Davis *v.* Sims, Hill & Denio, (N. Y.) 234. It is, in fact, no more than the application of the maxim *simplex commendatio non obligat.* Taylor *v.* Fleet, 4 Barb. S. C. (N. Y.) 95.

It is obvious, however, that the maxim must meet with a strict construction where the land which is the subject of the purchase is at a distance, and the purchaser relies wholly upon its description as given by the vendor. Bean *v.* Herrick, 12 Me. 262; Smith *v.* Richards, 13 Pet. (S. C. U. S.) 26; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Van Epps *v.* Harrison, 5 Hill, (N. Y.) 63; Babcock *v.* Case, 61 Pa. 430. See Clark *v.* Baird, 7 Barb. S. C. (N. Y.) 65, where it was held that if the purchaser had the opportunity of ascertaining the true boundary line and neglected to inform himself, he could not recover damages for a misrepresentation of that boundary by the vendor, and a similar decision was made in the recent case of Brooks *v.* Hamilton, 15 Minn. 26.

[1] Lord Lyndhurst (whose wonderful memory and lucid statement, both in his judgment in the Exchequer and his defence of it in the House of Lords, are chronicled in 8 Campbell's Chancellors, 73) considered the law to be clearly settled that where representations with respect to the nature and character of the property which is to become the subject of purchase affect the value of that property, and those representations afterwards turn out to be incorrect and false to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised, and in a court of equity a foundation is laid for setting aside the contract which was founded upon a fraudulent basis. "I do not understand that that proposition is disputed by either of my noble and learned friends; it was distinctly laid down and decided in the case referred to in the judgment below, and which has been referred to at your Lordships' bar; I mean Dobell *v.* Stevens, 3 Barn. & Cress. 623. That was one of those ordinary cases which frequently come before the courts of common law. It was a case of the purchase of a public house; a false representation — false to the knowledge of the party making it — was made by the vendor with respect to the extent of the custom as to the quantity of beer that was drawn during a certain period. The books were in the house; it was part of the case that the purchaser might have had access to them if he thought proper; but notwithstanding that circumstance, it being proved that the representation was false, the Court of King's Bench were of opinion that an action of damages might under such circumstances be sustained." This case, however, was more distinguishable from Small *v.* Attwood than Lord Lyndhurst seemed to suppose, as the vendor made a definite statement which was intended to prevent the purchaser from making investigations which would have shown that statement to be false, and Dobell *v.* Stevens is fully supported by American authority. Ward *v.* Packard, 18 Cal. 391; Campbell *v.* Whittingham, 5 J. J. Marsh. (Ky.) 96; Parham *v.* Randolph, 4 How. (Miss.) 451; Burwell *v.* Jackson, 5 Seld. (N. Y.) 545; see, however, and consider Griffith *v.* Kempshall, Clarke's Ch. R. (N. Y.) 571; Tallman *v.* Green, 3 Sandf. S. C. (N. Y.) 437; Hunt *v.* Moore, 2 Pa. 107; Napier *v.* Elam, 6 Yerg. (Tenn.) 108.

The distinction between the *allegatio falsi* and the *suppressio veri* would seem to be that the non-disclosure, in order to constitute fraud, must be of facts which the seller was under an obligation to disclose.

material difference of opinion in the House of Lords as to the law which should govern it.[1]

"I make no distinction," said Bayley, J., in Early *v.* Garrett, 9 Barn. & Cress. 928, "between an active and a passive communication, for a fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller of a fact *which he ought to communicate* would undoubtedly vitiate the sale." See also Pearson *v.* Morgan, 2 Bro. Ch. 390. So it was said by Story, J., that "the true definition of undue concealment which amounts to a fraud in the sense of a court of equity, and from which it will grant relief, is the non-disclosure of those facts and circumstances which one party is under some legal or equitable obligation to communicate to the other." 1 Story's Eq. § 207; Young *v.* Bumpass, 1 Freem. Ch. (Miss.) 241; The State *v.* Holloway, 8 Blackf. (Ind.) 47; Saltonstall *v.* Gordon, 33 Ala. 151.

The question, however, of what the vendor ought to inform the purchaser, and what he is under no such obligation to do, will sometimes be a difficult one, and as was well said in Bean *v.* Herrick, 12 Me. 262, "the maxim *caveat emptor* is a sufficient answer to mere silence in regard to defects open to observation, but the line which separates cases where this maxim applies from others which call for relief is not defined with precision; each case rests upon its peculiar circumstances." The question will often depend much upon the basis of dealing between the parties. "The court, in many cases," said Lord Eldon in Turner *v.* Harvey, Jacob, 178, "has been in the habit of saying that where parties deal for an estate they may put each other at arm's length, and where incumbrances are matter of record or are patent, and the purchaser views for himself, it is apprehended that equity will not rescind on the ground of mere silence on the part of the vendor." This distinction between the *allegatio* and the *suppressio* was observed in Richardson *v.* Boright, 9 Verm. 368, where the incumbrance was of record; and it was said that if the vendor had notice and used no means to prevent knowledge to the purchaser, who had the means of informing himself within his power, it was no fraud — he was not bound to inform him. See also Griffith *v.* Kempshall, Clarke's Ch. (N. Y.) 576; Ward *v.* Packard, 18 Cal. 391. Of course, however, this rule will be much relaxed or entirely lose its application where any such confidential relation exists between the vendor and purchaser as to put them upon unequal terms; Brice *v.* Brice, 5 Barb. (N. Y.) 540; Babcock *v.* Case, 61 Pa. 430; notes to Fox *v.* Mackreth, 1 Lead. Cas. in Eq.

The converse of the position stated above is equally true, for as was said by Lord Eldon in the case just cited, in referring to the remarks of Lord Thurlow in Fox *v.* Mackreth, 2 Bro. Ch. 420, "If an estate is offered for sale, and I treat for it, knowing that there is a mine under it, and the other party makes no inquiry, I am not bound to give him any information of it. [Harris *v.* Tyson, 24 Pa. 360.] He acts for himself and exercises his own senses and knowledge. But a very little is sufficient to affect the application of the principle. If a single word is dropped which tends to mislead the vendor, that principle will not be allowed to operate." And, in general, it may be said that any course of dealing calculated to create a false impression on the purchaser will amount to a fraud; Misner *v.* Granger, 4 Gilm. (Ill.) 69; Young *v.* Bumpass, 1 Freem. Ch. (Miss.) 241; Bean *v.* Herrick, 12 Me. 262; Early *v.* Garrett, 9 Barn. & Cress. 928; as where the seller should state facts which were true in themselves, but so expressed as to give the idea that they conveyed the whole trust, while a material fact is kept back; Allen *v.* Addington, 7 Wend. (N. Y.) 10, 11; id. 75; Kidney *v.* Stoddart, 7 Met. (Mass.) 252.

[1] Sugden has remarked (Law of Property, 598), that to the rule of law, as thus qualified and explained, no exception can be taken, and adds, with great propriety, "There is no part of the jurisdiction of a court of equity which requires to be executed with more caution than that of rescinding a contract. This we shall see powerfully exemplified in this very case of Small *v.* Attwood. If there be fraud,

In a subsequent case, the plaintiffs having filed a bill to compel payment of a residue of the purchase money due on a lease of

the remedy is clear of difficulty. But the court ought to be quite sure of the grounds upon which it decides, for by rescinding the contract it may do irreparable damage to one party, whilst by refusing to interfere it does not deprive the other party of his remedy by an action of deceit if he really have been deceived."

After an able condensation and review of the facts in the case, he continues: "I thought at one time, from its complicated facts, that it could hardly perhaps be cited as an authority for anything beyond the general principle; but I felt bound to put the reader in possession of a general view of the case, and my present calm review of it has satisfied me that it is a precedent of much importance. It affords an excellent commentary on the rule of law, and exemplifies the process by which we are to arrive at a just conclusion. The opposite views taken of the particular evidence is not important, but the principles by which the House of Lords were guided are indeed important. Previously to this case, the instances were rare in which a purchaser, on the ground of misrepresentations prior to a written contract which was silent on that head, and after inquiry, and with means of knowledge and possession, had applied to a court of equity to rescind the contract. If the decree had remained undisturbed, followed as it was by an injunction operating on the funded property into which the purchase money had been invested, no doubt many such experiments would have been made. But the decision of the Lords placed the doctrine on the right foundation. Fraud is a sufficient ground for relief, but it is not to be made out from ambiguous papers where the parties investigated the books and accounts and inquired for themselves, and with possession and full means of knowledge delayed for some months to apply for relief. Indeed, it is manifest that the same conclusion would have been arrived at if the application had been made at an earlier period. The danger of resting upon such evidence as was produced in this case to impeach the written contract is proved by the opposite views of the very learned persons who gave judicial opinions upon the force and effect of it; but the Lords in effect decided that where there are ample means of forming a judgment from written papers and correspondence, much credit is not to be attached to alleged conversations and exclamations, particularly if they are not distinctly charged in the bill, so as to enable the other party to meet them." In his last edition of the Vendors, he remarked: "It was not too much to expect that if, in a contract of such magnitude, in which of course there was previous inquiry, the purchasers bought on the representation of the seller as to the cost of producing pig iron, they should have required him to bind himself *by the contract* to those representations, and to agree to reduce the purchase money if they proved to be incorrect. Such a simple precaution would have prevented the vast litigation in that case; but it is clear that if such a demand had been made, it would not have been acceded to, and that if it had been refused, the purchasers would have executed the contract without it."

An even greater lawyer, Sir George Jessel, late Master of the Rolls, said of the class of cases of which Small *v.* Attwood is a leading one: "In some observations of noble lords in the House of Lords, there are remarks which I think, according to the course of modern decisions, are not well founded, and do not accurately state the law. As regards the rescission of a contract, there was no doubt a difference between the rules of courts of equity and the rules of courts of common law — a difference which of course has now disappeared by the operation of the Judicature Act, which makes the rules of equity prevail. According to the decisions of courts of equity, it was not necessary, in order to set aside a contract obtained by material false representation, to prove that the party who obtained it knew at the time when the representation was made that it was false. It was put in two ways, either of which was sufficient. One way

mines, which the defendants had entered upon and worked for three years, the defendants filed a cross-bill for relief on the

of putting the case was: 'A man is not to be allowed to get a benefit from a statement which he now admits to be false. He is not to be allowed to say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; he ought to have found that out before he made it.' The other way of putting it was this: 'Even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract. To do so is a moral delinquency; no man ought to seek to take advantage of his own false statements.' The rule in equity was settled, and it does not matter on which of the two grounds it was rested. As regards the rule of common law, there is no doubt it was not quite so wide. There were, indeed, cases in which, even at common law, a contract could be rescinded for misrepresentation, although it could not be shown that the person making it knew the representation to be false. They are variously stated, but I think, according to the later decisions, the statement must have been made recklessly and without care, whether it was true or false, and not with the belief that it was true. But, as I have said, the doctrine in equity was settled beyond controversy, and it is enough to refer to the judgment of Lord Cairns in the Reese River Silver Mining Co. *v.* Smith, L. R. 4 H. L. 64, in which he lays it down in the way which I have stated.

"There is another proposition of law of very great importance which I think it is necessary for me to state. . . . If a man is induced to enter into a contract by a false representation, it is not a sufficient answer to him to say, 'If you had used due diligence you would have found out that the statement was untrue. You had the means afforded you of discovering its falsity, and did not choose to avail yourself of them.' I take it to be a settled doctrine of equity, not only as regards specific performance but also as regards rescission, that this is not an answer unless there is such delay as constitutes a defence under the statute of limitations. That, of course, is quite a different thing. . . . Nothing can be plainer, I take it, on the authorities in equity, than that the effect of false representation is not got rid of on the ground that the person to whom it was made has been guilty of negligence. One of the most familiar instances in modern times is where men issue a prospectus in which they make false statements of the contracts made before the formation of a company, and then say that the contracts themselves may be inspected at the offices of the solicitors. It has always been held that those who accepted those false statements as true were not deprived of their remedy merely because they neglected to go and look at the contracts. Another instance with which we are familiar is where a vendor makes a false statement as to the contents of a lease, as, for instance, that it contains no covenant preventing the carrying on of the trade which the purchaser is known by the vendor to be desirous of carrying on upon the property. Although the lease itself might be produced at the sale, or might have been open to the inspection of the purchaser long previously to the sale, it has been repeatedly held that the vendor cannot be allowed to say, 'You were not entitled to give credit to my statement.' It is not sufficient, therefore, to say that the purchaser had the opportunity of investigating the real state of the case, but did not avail himself of that opportunity."

Referring to the judgments delivered in Small *v.* Attwood, he said (and every one's experience in similar cases confirms it), "Of course where you have five lords giving independent reasons, it is very difficult to ascertain with accuracy the ground upon which the House of Lords decided, but I think that in all such cases you must only look at the judgments of the majority who decided the case, for the reasons to be found in their judgments must be either wholly or to some extent the reasons which guided the House of Lords in coming to their conclusion."

ground of misrepresentation and fraud, which was dismissed in the Irish Chancery, and upon appeal taken to the House of Lords the decree was affirmed,[1] the Chancellor observing, that in a case

And then, referring with succinct accuracy to the judgments delivered, he added, "In no way, as it appears to me, does the decision, or any of the grounds of decision, in Attwood *v.* Small, 6 Cl. & Fin. 232, support the proposition that it is a good defence to an action for rescission of a contract on the ground of fraud that the man who comes to set aside the contract inquired to a certain extent, but did it carelessly and inefficiently, and would, if he had used reasonable diligence, have discovered the fraud." Redgrave *v.* Hurd, L. R. 20 Ch. Div. 1. And in the next case in the same volume (Smith *v.* Chadwick, id. 27) the same learned judge enforced this and other parts of the same doctrine with his accustomed knowledge of the subject matter and terse force.

In the very recent case of Newbigging *v.* Adam, L. R. 34 Ch. Div. 582, where the result of the facts was stated to be that the contract was made under a substantial misstatement, though not made fraudulently, and the question was as to the extent of indemnity to which the plaintiff was entitled upon the rescission of the contract, Lord Justice Bowen, in delivering his opinion, said: "It is said that the injured party is entitled to be replaced *in statu quo*. It seems to me that when you are dealing with innocent misrepresentation, you must understand that proposition, that he is to be replaced *in statu quo*, with this limitation — that he is not to be replaced in exactly the same position in all respects, otherwise he would be entitled to recover damages, but he is to be replaced in his position so far as regards the rights and obligations which have been created by the contract into which he has been induced to enter. That seems to me to be the true doctrine, and I think it is put in the neatest way in Redgrave *v.* Hurd." And after citing the foregoing part of that decision, he added, "With great respect for the shadow and memory of that great name, I cannot help saying that this is not a perfect exposition of what the common law was, but, so far as the rule of equity goes, I must assume that the Master of the Rolls spoke with full knowledge of the equity authorities, and he treats the relief as being the giving back by the party who made the misrepresentation of the advantages he obtained by the contract."

[1] Vigers *v.* Pike, 2 Dru. & War. 1; 8 Cl. & Fin. 562. In a later case, Gibson *v.* D'Este, 2 You. & Col. (N. S.), 542, Dom. Proc. 1 Cl. & Fin. (N. S.) 605, *nom.* Wilde *v.* Gibson, the question was whether a purchaser was entitled to rescind an executed contract because of the omission to mention the existence of a right of way over part of the grounds in front of the house; though no charge of personal fraud was made against the defendant, nor was there any evidence that she knew of the deed creating the right of way, or of the payments of the rent for the same, except that they appeared in the accounts rendered to her by her agent, which payments did not so specifically appear in the accounts as to convey definite information to the owner as to the ground of their payment. The Vice-Chancellor decreed that the sale should be rescinded with costs, being of opinion that the contract and its completion took place under concealment from the purchaser, and substantially under misrepresentation to him of material facts within the knowledge of the defendant or her agent, whose knowledge for the present purpose was to be held equivalent to her knowledge, but not within the knowledge of the plaintiff, he being without the means of knowing the true state of these facts.

This decree, however, was reversed in the House of Lords (1 Cl. & Fin. (N. S.) 605), principally, it was said, on the ground that the doctrine of constructive notice to the defendant, from the knowledge of her solicitor, could not be applied to the case. "The effect of constructive notice," said Lord Cottenham, in delivering his judgment, "in cases where it is applicable, as in contests between equities of innocent parties, is sufficiently severe, and

depending upon alleged misrepresentations as to the nature and value of the thing purchased, the defendant could not adduce

is only resorted to from the necessity of finding some ground for giving preference between equities otherwise equal; but this is the first time I ever knew it applied in support of an imputation of direct personal fraud and misrepresentation. The two things cannot exist together — there can be no direct personal fraud without intention, and there can be no intention without knowledge of the fact concealed or misrepresented; and if there be knowledge, the case of constructive notice cannot arise; it would be absorbed in the proof of knowledge." He further said that the decree could not be supported on the authority of Edwards *v.* McLeay (*supra*, p. 537), "for in that case there was knowledge in the vendor and a false representation, both of which are wanting in the present case. A case much more in point is that of Legge *v.* Croker, 1 Ball & Beat. 506, in which the lessor had assured the lessee that there was no right of way over the ground; that there had been formerly, but that it had been legally stopped by a grand jury presentment forty years before. It turned out that there was a footway, the presentment applying only to a carriage-way, and the lessee was convicted for obstructing it, whereupon he filed his bill to be relieved from the lease; but Lord Manners dismissed his bill, saying, 'If there were a wilful misrepresentation, the plaintiff might be entitled to relief, but the lessor conceived himself entitled in point of law in asserting that there existed no right of way; it cannot be called a misrepresentation.' That was a much stronger case against the lessor than the present is against the vendor." With this opinion Lord Brougham entirely concurred, and Lord Campbell thought it was necessary to observe strictly the difference between the rules which apply to a contract still executory, and one actually executed. "If there be in any way whatever," said he, "misrepresentation or concealment, which is material to the purchaser, a court of equity will not compel him to complete the purchase; but where the conveyance has been executed, I apprehend that a court of equity will set aside the conveyance only on the ground of actual fraud. And there would be no safety for the transactions of mankind, if upon a discovery being made, at any distance of time, of a material fact not disclosed to the purchaser, of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside." He entirely dissented from the position that an action of deceit could be maintained without positive fraud, and said that there was no evidence that the solicitor of the vendor received any knowledge of the deed in the course of his agency. "The knowledge, then, amounts to nothing. He had no knowledge which would show that he was guilty of a fraudulent misrepresentation." But this decision seems to have been very generally disapproved by the profession. The strictures of Sugden (Law of Property, 637) upon the reversal of the decree of the Vice-Chancellor are very severe, and in the course of them he says: "It is also worthy of notice, and seems to have escaped all attention, that the defendant covenanted that notwithstanding any act done by herself or her mother, the former owner, she was seised of (all and singular the lands, hereditaments, mansion-house, and premises conveyed, of a perfect and indefeasible estate of inheritance in fee simple in possession, without any manner of condition, qualification, restriction, matter, or thing whatsoever, expressed or implied, and which could revoke, determine, abridge, qualify, alter, charge, incumber, or prejudicially affect the same in any manner aforesaid), with the other usual covenants following. Now, can a more distinct representation of a seisin in fee, not controlled by any deed executed by the mother of the vendor, be framed?" But it is probable that instead of this fact having escaped the attention of the able counsel in this carefully argued case, it was not deemed a proper subject of attention, as covenants for title are not *representations*, in the sense in which that word is used in this connection. Dart fully

more conclusive evidence or raise a more effectual bar to the plaintiff's case than by showing that the plaintiff was, from the beginning, cognizant of all the matters complained of, or, after full information concerning them, continued to deal with the property, and even to exhaust it in the enjoyment, as by working mines.[1]

§ 323. The exception recognized by this class of cases, however, seems to be the only one to the well-settled rule that the purchaser's right to relief, after the execution of his deed, depends solely on the covenants for title which it contains,[2] and hence the question arises, how far the purchaser is, either at law or in equity, allowed to detain the unpaid purchase money, or recover it back if already paid, where there is a defect or incumbrance which is covered by the covenants for title which he has received; in other words, as in the absence of covenants the purchaser can have no relief as to the purchase money, how far the presence of covenants entitles him to relief.

The cases will naturally be found more numerous in this country than in England. The almost universal practice there of limiting

shares Sugden's general disapprobation of the decision in the Lords (Vendors, 734), and Kerr says of it, "Though it was the decision of the highest tribunal, it cannot be said to be founded on sound principles." Kerr on Fraud, 15.

The foregoing cases in the House of Lords have been referred to at some length, both on account of their intrinsic importance as decisions in the court of last resort in England, and because they show, as conveniently as any other class of cases, the principles by which the rescission of executed contracts are to be governed in cases of concealment or misrepresentation. It will have been perceived that the difficulty of the cases consists not so much in the principles themselves as in their application.

[1] Colby *v.* Gadsden, 34 Beav. 416, is to the same effect, and see *accord.* Pintard *v.* Martin, 1 Sm. & Marsh. Ch. (Miss.) 126; 1 Story's Eq. § 203 *a*; Tindall *v.* Harkinson, 19 Ga. 448; Cunningham *v.* Fithian, 2 Gilm. (Ill.) 650; Glasscock *v.* Minor, 11 Mo. 655; Masson *v.* Bovet, 1 Denio, (N.Y.) 69; Lockridge *v.* Foster, 4 Scam. (Ill.) 570. Length of time, however, will obviously be no bar if the plaintiff has acted promptly upon the *discovery* of the fraud. McLean *v.* Barton, Harr. Ch. (Del.) 379; Concord Bank *v.* Gregg, 14 N. H. 331. In the much litigated case in New York of Whitney *v.* Allaire, 4 Denio, 554, 1 Comst. 310, it was held that although the purchaser would not be suffered to rescind the contract, if after the discovery of fraudulent representations as to its territorial extent he had gone on to affirm it, yet that such affirmance of the contract only made it binding as such, and did not destroy the right to recover damages for the tort as a distinct and separate transaction, "and it is obviously just that the vendee should be able to insist on the performance of a contract which may be essential to his interests without waiving his right of compensation to the full extent to which he has been led to make a worse bargain by the misrepresentations of the vendor." Notes to Chandelor *v.* Lopus, 1 Smith's Lead. Cas.

[2] *Supra*, § 321.

the covenants for title to the acts of the vendor[1] of course confines such questions between fewer parties than where, as in parts of this country, it is the practice to receive general covenants for the title.[2] Where the covenants are general, the whole previous question of title is thrown open, the vendor covenants that he is seised of an indefeasible estate, that it is free from all incumbrance, or that he will warrant and defend it to the purchaser against all persons whomsoever. Hence any defect or incumbrance, no matter by whom caused or how far back in the chain of title, can raise a question which in England could only arise where the defect was created by a single person, that is, the vendor, or perhaps his ancestor or testator.[3]

§ 324. Before considering particularly the cases which allow a purchaser to detain his purchase money by reason of defects or incumbrances, it may be proper briefly to advert to the principles on which such a right is based.

It is familiar that the system of the common law did not recognize the propriety of settling cross demands in the same suit. The object of each action was to determine the right of the plaintiff as to the particular subject of his demand, without regard to any claim which the defendant might have growing out of the transaction. To say nothing of convenience, it was of course monstrous that an insolvent plaintiff, who owed his solvent debtor more than the amount he sued for, should be allowed to recover it, and hence the civil law had, ages ago, introduced the right of set-off under the name of compensation or stoppage.[4] It formed, however, no part of the old common law, and no statute recognized

[1] Or his ancestor, or the last person claiming by purchase in the popular sense. *Supra*, § 27.

[2] *Supra*, § 28 *et seq.*

[3] The cases in the English books as to payment of the purchase money are chiefly those of bills for specific performance, and depend on questions which arise before the execution of the deed (as to which see Dart on Vendors (5th ed.), c. 18, and note to Seton *v.* Slade, 2 Lead. Cas. in Eq.), and questions arising after its consummation are much more restricted than in the American cases; for in England, where the covenants are limited to the acts of the vendor, he is apt to be aware of any defects or incumbrances of his own creation, and hence the questions often turn, as has just been seen, upon the point of knowledge and concealment by him, or the neglect of vigilance on the part of the purchaser. But where general covenants are given, and sometimes even regarded as a substitute for examination of the title, many cases must arise where there is no question of concealment, as the vendor cannot be aware of every defect which a previous owner may have caused.

[4] Story's Eq. Jur. ch. xxxviii.; Freeman *v.* Lomas, 9 Hare, 109.

it till the first of the statutes of bankruptcy in 1706,[1] and it was long supposed that till then the doctrine was unknown in courts of law.[2] It has been shown in the present century, however, that as early as 1675 the doctrine *was* enforced in courts of law.[3] We know that equity had at some time or other adopted it, but when, exactly, is not known.[4] Of course with the passage of the statutes of bankruptcy,[5] and, still later, of the statutes of set-off,[6] the jurisdiction became familiar. It is somewhat curious, as matter of legal history, that the first statute of set-off in the English language was passed in the Colony of Pennsylvania in 1682, twenty-six years before the English statute.[7]

It was, however, some time before the spirit which led to these statutes infused itself into cases which did not come within the letter of their enactment. Thus with respect to personal estate, the purchaser of a chattel was not allowed, in an action for its price, to set up as a defence a breach of warranty either as to quality or title, but was forced to pay the amount, and driven to a cross action by which to establish his own claim.[8] It is not ne-

[1] 4 Anne, c. 17, A. D. 1706.

[2] See per Story, J., in Green *v.* Darling, 5 Mason, (C. C. U. S.) 201.

[3] By Mr. Christian, 1 Bankr. Law, 499. See also Anon., 1 Mod. 215 (A. D. 1675); Chapman *v.* Derby, 2 Vern. 117 (1689); Gibson *v.* Bell, 1 Bing. N. C. 753; notes to Rose *v.* Hart, 2 Smith's Lead. Cas.; Receivers *v.* Patterson Co., 3 Zab. (N. J.) 283.

[4] In *Ex parte* Stephens, 11 Vesey, 27, decided in 1805, Lord Eldon said, "As to the doctrine of set-off, this court was in possession of it, as grounded on principles of equity, long before the law interfered;" but how long before, he does not say. The first reported case seems to be Hawkins *v.* Freeman, 2 Eq. Cas. Ab. 10, s. c. more fully in 8 Vin. Ab. 560, decided by Lord Macclesfield long after the statute of Anne and later statutes of bankruptcy to which the Chancellor referred: "In mutual dealings between tradesmen, it is reasonable to suppose they intend one debt should be set against the other, and the balance only to be paid, as it is per statute of bankrupts." This was, however, five years before the first statute of set-off.

[5] 4 Anne, c. 17, *supra*; 5 Geo. I. c. 11; 5 Geo. II. c. 30; 46 Geo. III. c. 135, etc.

[6] 2 Geo. II. c. 22, A. D. 1729; 8 Geo. II. c. 24.

[7] In the Great Law (A. D. 1682, Linn's Laws, 118 and note) it was provided that "for avoiding numerous suits, if two men dealing together be indebted to each other upon bonds, bills, bargains, or the like, provided they be of equal clearness and truth, the defendant shall, in his answer, acknowledge the debt which the plaintiff demandeth, and defaulk what the plaintiff oweth to him upon the like clearness." This statute was repealed in England eleven years later, when it was promptly re-enacted in the Colony in the same words. 2 Linn, ib. 200. This again was repealed, and then in 1700 was passed another act, also in the same words, and this was repealed in 1705. 4 Miller's Laws, 18. The Colony immediately passed another act, which has been the law ever since. 1 Purdon's Dig. 603. And all this was before there was any statute at all in England.

[8] See the cases cited in Basten *v.* Butter, 7 East, 479; and per Lord Ellenborough in Farnsworth *v.* Garrard, 1 Camp. 39; Crowninshield *v.* Robinson, 1 Mason, (C. C. U. S.) 93; Thornton *v.* Wynn, 12 Wheat. (U. S.) 183. In Moggridge

cessary here to analyze the train of decisions which have departed from this severity of rule, and finally established the doctrine, on both sides of the Atlantic, that a purchaser may, in a suit brought for the purchase money of a chattel, take advantage of the breach of warranty as a defence, not as a technical set-off, but as evidence of failure of consideration and in mitigation of damages. Such a doctrine was at first totally denied; then a distinction was taken, as to its admissibility as a defence, between actions brought to recover the contract price and actions brought on securities given for that price;[1] then the defence was admitted when it went to the whole consideration, but rejected when it touched only a part;[2] until finally the doctrine as stated is well settled.[3]

It is difficult, however, to say under what precise head such a defence is to be classed. It could not, in strictness, come under the head of set-off, for the purchaser's rights, in general, sound in unliquidated damages, which usually do not come within the statutes of set-off. It has been admitted, moreover, in cases where failure of consideration was not in point,[4] and in England it was at one time held that such a defence was not by way of a cross action, but by showing how much less the subject

v. Jones, 3 Camp. 38, and 14 East, 486, Lord Ellenborough applied the old rule to a case where the consideration of a bill of exchange was the execution of a lease. The defendant was let into possession, and the plaintiff then refused to execute the lease. It was held that this was no defence to the bill — that the defendant had his remedy upon the agreement.

[1] Morgan *v.* Richardson, 1 Camp. 40; Tye *v.* Gwynne, 2 id. 346; per Denison, J., in Robinson *v.* Bland, 2 Burr. 1082; Mann *v.* Lent, 10 Barn. & Cress. 877. And it would seem that this distinction still exists in the Court of Exchequer. Warrick *v.* Nairn, 10 Exch. 761.

[2] Templer *v.* McLachlan, 5 Bos. & Pull. 136, approved by Shaw *v.* Arden, 9 Bing. 287; Day *v.* Nix, 9 Moore, 159; Reese *v.* Gordon, 19 Cal. 149; Pulsifer *v.* Hotchkiss, 12 Conn. 234; see McAlpin *v.* Lee, id. 129.

[3] Allen *v.* Cameron, 3 Tyrw. 907; Poulton *v.* Lattimore, 9 Barn. & Cress. 259; Street *v.* Blay, 2 Barn. & Ad. 456; Mondel *v.* Steel, 8 Mees. & Welsb. 858; Peden *v.* Moore, 1 Stew. & Port. (Ala.) 71; Desha *v.* Robinson, 17 Ark. 244; Robinson *v.* Wilson, 19 Ga. 507; Brandt *v.* Foster, 5 Clarke, (Io.) 291; Herbert *v.* Ford, 29 Me. 546; Dodge *v.* Tileston, 12 Pick. (Mass.) 328; Harrington *v.* Stratton, 22 id. 510; Perley *v.* Balch, 23 id. 284; Goodwin *v.* Morse, 9 Met. (Mass.) 279; Dorr *v.* Fisher, 1 Cush. (Mass.) 272; Reed *v.* Prentiss, 1 N. H. 174; Shepherd *v.* Temple, 3 id. 458; Britton *v.* Turner, 6 id. 481; Elliott *v.* Heath, 14 id. 131; M'Allister *v.* Reab, 4 Wend. (N. Y.) 489; s. c. 8 id. 109; Batterman *v.* Pierce, 3 Hill, (N. Y.) 171; Whitney *v.* Allaire, 4 Denio, (N. Y.) 557; s. c. 1 Comst. (N. Y.) 306; Steigleman *v.* Jeffries, 1 Serg. & Rawle, (Pa.) 478; Patterson *v.* Hulings, 10 Pa. 507; Mercer *v.* Hall, 2 Tex. 284; Withers *v.* Greene, 9 How. (S. C. U. S.) 214; Van Buren *v.* Digges, 11 id. 461, overruling Thornton *v.* Wynn, 12 Wheat. (S. C. U. S.) 183.

[4] Ives *v.* Van Epps, 22 Wend. (N. Y.) 155.

matter of the contract was worth, by reason of the breach of the warranty,[1] while in New York it received the name of recoupment.[2]

But by whatever technical term such a defence may be called — whether it be compensation, set-off, failure of consideration, or recoupment — the principle on which it is based is the same as that which led to the statutes of set-off, viz. that of preventing circuity of action; and to whatever extent the common law rules of pleading may have rejected defences which involved more than one issue, it has been found, in modern times, less inconvenient to determine, in the same action, as well the rights of the defendant as those of the plaintiff, than to oppress courts and parties with different suits springing from the same subject matter.

§ 325. In considering the rights of the purchaser at law, it may also be remarked that, according to the rules of the common law, if the purchase money of real estate were secured by a bond or any other sealed instrument, no defence whatever could, in the absence of *illegality* of consideration,[3] be admitted to its payment, even where the title to the land had utterly failed and the purchaser been evicted from its possession. There could be no defence on the ground of failure of consideration, for the seal imported a consideration which the purchaser was estopped from gainsaying;[4] and hence the purchaser's only remedy was by recourse to equity. But in some of the United States, the common law rule as to specialties has been relaxed by statutory provisions, so far as to entitle the obligor of a bond, under some restrictions, to show by way of defence its *failure*, as he formerly could have done its *illegality* of consideration;[5] and where such is the case it is of course immaterial, so far as this question is

[1] Mondel *v.* Steel, 8 Mees. & Welsb. 858.

[2] The subject here so briefly and incidentally touched upon will be found fully considered in the American notes to the cases of Chandelor *v.* Lopus and Cutter *v.* Powell, 1 and 2 Smith's Lead. Cas.; in a chapter on Recoupment, in Sedgwick on Damages; in 2 Kent's Comm. 470, etc.; Withers *v.* Green, 9 How. (S. C. U. S.) 214; Wheat *v.* Dotson, 12 Ark. 699; Goodwin *v.* Robinson, 30 id. 535; and 7 Amer. Law Review, 389.

[3] Fraud would be no defence, unless the fraud related to the execution of the instrument. Rogers *v.* Colt, 1 Zabr. (N. J.) 704; see *infra*. As to illegality of consideration, see the notes to Collins *v.* Blantern, 1 Smith's Lead. Cas.

[4] Collins *v.* Blantern, 2 Wils. 347; Vrooman *v.* Phelps, 2 Johns. (N. Y.) 178; Rogers *v.* Colt, *supra*.

[5] Case *v.* Boughton, 11 Wend. (N. Y.) 107; Wilson *v.* Baptist Society, 10 Barb. S. C. (N. Y.) 312; McKnight *v.* Kellett, 9 Ga. 534; *infra*, p. 561, n. 4.

concerned, whether the purchase money be secured by a specialty or otherwise.

§ 326. Apart from the form in which the contract is expressed, it would at first sight seem immaterial whether the position of the purchaser were that of a defendant resisting payment of the purchase money or that of a plaintiff seeking to recover it back in an action for money had and received; as there would seem to be no reason on principle, why, if the purchaser have a right permanently to detain unpaid purchase money on the ground of a defect of title, he should be prevented from recovering back that for which he has received no value. But the position of the purchaser of real estate, *as a plaintiff*, must at law necessarily be confined to a suit upon the covenants in his deed, which suit (though the same end may be obtained by means of it) depends to some extent upon different principles and machinery from an action which seeks to rescind the contract and recover back its consideration. Hence it may safely be said that, at law, a purchaser has no right, after the execution of his deed, to recover back his consideration money on the ground of a defect or failure of title. His remedy in such case is by an action of covenant, and not by an action of assumpsit.[1] But when the position of the purchaser is that of *a defendant*, although "the technical rule remits him back to his covenants in his deed," [2] yet, as has been said, it is now considered that he should not be compelled to pay over purchase money which he might the next day recover in the shape of damages for a breach of his covenants, and hence, to prevent circuity of action, the defence at law of a failure of title has been in some cases allowed.

§ 327. It is not strange that where there has been no uniform

[1] Toussaint *v.* Martinnant, 2 Term, 104; Earle *v.* De Witt, 6 Allen, (Mass.) 526; Tillotson *v.* Grapes, 4 N. H. 448; Hunt *v.* Amidon, 4 Hill, (N. Y.) 345; (see Lee *v.* Dean, 3 Whart. (Pa.) 329, which is not opposed to these cases). In Miller *v.* Watson, 5 Cow. (N. Y.) 195, the plaintiff proved a promise on the part of his vendor, who had sold to him with a covenant of warranty, to repay the consideration money, as the title had failed, but the court held that there having been no eviction of the plaintiff, the promise was without consideration, and that the plaintiff's only remedy was on the covenants in his deed. In Earle *v.* De Witt, *supra*, parol evidence to prove such a promise was held inadmissible. And in Moyer *v.* Shoemaker, 5 Barb. S. C. (N. Y.) 319, it was held that apart from this ground, before an action of assumpsit could be maintained by a purchaser to recover the consideration paid by him for land sold with covenants, he must reconvey the land to the vendor. See *supra*, § 184 *et seq.*

[2] 2 Kent Comm. 473.

doctrine under which such a defence has been classed, there should have been some discrepancy in the various cases as to the grounds of their decision. As the authorities generally seem to treat the question in a court of law as one arising from failure of consideration, it becomes necessary to inquire what the consideration for the purchase money of real estate really is. Although the mere receipt of the deed, containing certain covenants for the title, does not, unless in exceptional cases, of itself form a consideration,[1] yet, as has been already said, the absence or presence of

[1] In the early case in Maine of Lloyd *v.* Jewell, 1 Greenl. 352, it was said that the Supreme Court of Massachusetts had for a long series of years proceeded upon the principle that *the covenants* in a deed were a valuable consideration for a note given for the purchase money (and such seems to have been thought in Gridley *v.* Tucker, 1 Freem. Ch. (Miss.) 211), and that the want or failure of title would be no legal defence; and acting upon this supposed train of decision, which it was said laid down the true principle of law, it was held that the defendant, having received such covenants, had no defence to the payment of his note. It was further said that whatever claim the defendant might have was upon his covenants, and that to allow him in that action of assumpsit thus to defend would be to give him a greater right as defendant than he could have as plaintiff; and also that a difficulty might arise in the way of such a defence from the measure of damages, which in that State were fixed, on a covenant of warranty, by the value of the land at the time of eviction, which might be much greater or less than the purchase money; and lastly, that if such a defence were allowed in that action, not only would there be nothing on the record to prevent the recovery of damages upon the covenant for the very defects for which an allowance had thus been made, but nothing on which the payee of the note could found an action against his own warrantor.

It has, however, been since denied in Massachusetts that any such course of decision as that referred to by the court in Lloyd *v.* Jewell ever prevailed in that State. Fowler *v.* Shearer, 7 Mass. 19, and Phelps *v.* Decker, 10 id. 279, merely contained loose *dicta*, and the doctrine that the covenants in a deed formed such a consideration as to preclude question as to the title is opposed to principle and authority. Cook *v.* Mix, 11 Conn. 432; Deal *v.* Dodge, 26 Ill. 458; Knapp *v.* Lee, 3 Pick. (Mass.) 459; Rice *v.* Goddard, 14 id. 293; Trask *v.* Vinson, 20 id. 110; Tillotson *v.* Grapes, 4 N. H. 448.

As to the other grounds suggested in Lloyd *v.* Jewell, it may be observed that the objection as to the measure of damages cannot apply, since it is as competent to assess the damages by the same standard in that action as in one in which the vendee is the plaintiff. Tillotson *v.* Grapes, 4 N. H. 448. The objection on the ground of there being nothing to prevent the defendant, after having received a reduction of damages by reason of the defect, from suing upon the covenants and thus obtaining a double compensation, would equally apply to every other case of set-off, especially where its subject was not embodied in a special plea, but, as is usual in American practice (and as was formerly not unfrequent in England), contained in a notice and given in evidence under the general issue. It is obvious, as was said in Tallmadge *v.* Wallis, 25 Wend. (N. Y.) 116, that the effect of setting up such a defence would operate as an estoppel to the purchaser, if he should attempt to bring an action for a breach of warranty, after he had been once satisfied for his damages; or if the jury found a verdict which, in terms, or by necessary implication, negatived the existence of the facts set up in this plea. The later cases in

these covenants, or of some of them, has a material bearing upon the question. Thus where the deed contains no covenants, the purchaser is wholly without remedy, for the consideration was the mere transfer to him of the estate of the vendor, who was to be in no way responsible for the title, and when the deed is delivered to the purchaser, he has received the entire consideration for which he bargained, entirely irrespective of any future events, and the question of good or bad title is irrelative.[1] Where the covenants are limited to the acts of the vendor, the consideration would seem to be the present transfer of his estate, in the same condition as that in which he himself received it, and the future performance by himself and his heirs, when necessary, of the undertaking that the purchaser and those claiming under him shall not suffer from any of his or their acts.[2] The consideration is thus twofold: one which moves from the vendor at the time of the execution of the deed, and the other, which is executory, or, as it may be called, a continuing consideration. Where a defect has been caused by any one in the chain of title prior to the vendor, this can form no defence to the purchaser from payment of the purchase money, for the consideration between himself and his vendor is not affected.[3] Where the covenants are unlimited or general, the consideration seems to be the present transfer of the vendor's estate, and the future performance by himself and his heirs, when necessary, of the undertaking that the purchaser and those claiming under him shall not suffer from any of his or their acts, or from the acts of any one prior to him in the chain of title. Thus it may be possible for any defect or incumbrance whatever, whether caused by the vendor or his predecessors, to touch the consideration between himself and the purchaser.

Maine do not support the reasoning adopted in Lloyd *v.* Jewell, but treat the case as having decided merely that a *partial* failure of consideration was no defence to an action on the contract price. Wentworth *v.* Goodwin, 21 Me. 154; Jenness *v.* Parker, 24 id. 294; Herbert *v.* Ford, 29 id. 554. And in the last of these cases the tendency of modern decisions to allow a broader latitude of defence for the purpose of avoiding circuity of action was recognized with approbation, although with respect to real estate it was said to be the settled law of the State that a partial failure alone of title to land conveyed constituted no defence to a note given in payment of it; Morrison *v.* Jewell, 34 Me. 146; Thompson *v.* Mansfield, 43 id. 490.

[1] *Supra*, § 321.

[2] The analogy between the sale of real estate with covenants and the sale of chattels with warranty, has already been noticed, and Lord Tenterden, in Street *v.* Blay, 2 Barn. & Ad. 456, said that the plaintiff's *compliance with his warranty* was part of the consideration for the contract price.

[3] Starkey *v.* Neese, 30 Ind. 224.

Hence it follows that where the only covenants in the deed are of warranty or for quiet enjoyment, which are broken only by an eviction, actual or constructive, the only difficulty will be in determining whether there has or has not been an eviction, within the true meaning of the term.[1] If there has, the purchaser would be at that time entitled to recover damages upon these covenants, and circuity of action is clearly prevented by permitting him, when sued for the purchase money, to call upon the plaintiff to perform his covenant in that action; in other words, by allowing the former to defend himself to the extent of the measure of damages; or if the opportunity to do so has not been presented in a court of law, he can have recourse to equity, which, in the exercise of a familiar jurisdiction, can, by its varied machinery, ascertain the mutual rights of the respective parties and mould its decrees accordingly, by enjoining the collection of the purchase money, either temporarily or permanently, by awarding issues of *quantum damnificatus*, and by such other means and under such equitable conditions, etc., as the exigencies of the case may require.[2]

§ 328. If however, there has been no such eviction as would entitle the purchaser at that time to damages, it is apprehended that where the covenants of warranty or for quiet enjoyment are the only ones in the deed, no such defence can be permitted at law.[3]

§ 329. Where the deed contains a covenant for seisin, cases of difficulty may arise, except in those States in which this covenant is held to be fully satisfied by the transfer to the purchaser of a present possession.[4] It has been said in a former chapter, that in suing upon this covenant cases may occur in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet the failure of title may be so complete as to authorize the assessment of the damages by the consideration money, or a proportionate part of it, and that in such cases it might be proper and even necessary for the plaintiff to offer to reconvey the interest or title actually vested in him, and that although it would be no bar to his recovery that he had not done

[1] *Supra*, § 143 *et seq.*

[2] See generally as to the modes of administering relief, Morgan *v.* Smith, 11 Ill. 201; and *infra*, Ch. XV.

[3] For the remedy in equity under these circumstances, see *infra*, Ch. XV., where it will be seen that save as to exceptional cases, such as insolvency and the like, equity follows the law.

[4] See *supra*, § 41 *et seq.*

so, yet that the court might stay the execution, or reserve the actual entry of the judgment till such conveyance were made.[1] It is difficult to say how far this doctrine can be made to apply to actions where the defendant seeks to detain purchase money under similar circumstances. On the one hand, there are reasons growing from the desire to prevent circuity of action and the injustice that may often arise by reason of the delay, expense, and risk of the vendor's insolvency, to which the purchaser may be put by turning him round to his action on the covenant. On the other hand, the temptation offered to purchasers, when pressed for the contract price, to ferret out defects in the title of their vendor, is such as to induce a leaning in favor of the rule that unless there has been a *bona fide* eviction, actual or constructive, the parties must be left to pursue the remedies which they originally provided for themselves.

It is hoped that these introductory remarks may to some extent simplify the arrangement of the numerous cases upon this branch of law, which to some has seemed rather perplexed, more perhaps because the grounds of the decisions have not always been referred to the same principles, than from any difficulty as to the principles themselves.

§ 330. It is proposed to consider here the rights of the purchaser as they have been enforced in courts of law, and, in the subsequent chapter, in courts of equity.

The earliest prominent case in this country, as to the purchaser's right in a court of law to detain the purchase money of real estate by reason of a defect of title, was Frisbee *v.* Hoffnagle,[2] decided in New York in 1814, where, in an action on two notes given for the purchase money of land sold with a covenant of warranty, the defendant proved that the land had subsequently been sold under a judgment against the plaintiff, and a sheriff's deed made to the purchaser, and although it was also in evidence that the defendant had not been evicted or disturbed in his possession, the court ordered a nonsuit. On a motion for a new trial, the case was submitted without argument, and in refusing the new trial, it was held, *per curiam*, "The consideration for the note has entirely failed, for the defendant has no title, it having been extinguished by the sale under the judgment. Here is a

[1] *Supra*, § 184 *et seq.*

[2] 11 Johns. 50.

total, not a partial, failure of consideration; for although the defendant has not yet been evicted by the purchaser under the sheriff's sale, he is liable to be so, and will be responsible for the mesne profits.[1] To allow a recovery in this case would lead to a circuity of action; for the defendant, on this failure of title, would be entitled immediately to recover back the money. The motion to set aside the nonsuit must therefore be denied."

The objection to the soundness of this decision (which has since been repeatedly overruled[2]) is, that as the only covenant was that of warranty, there had been no eviction whatever, either actual or constructive, so as to give to the purchaser a right at that time to call upon the vendor to perform the covenant, and so prevent circuity of action. Hence the consideration was not touched.

§ 331. In Greenleaf *v.* Cook,[3] decided in the Supreme Court of the United States, in 1817, the defence to a note given for the purchase money of land, of the failure of its title, seems to have been excluded with entire propriety, as nothing in the report of the case shows that the deed contained any covenants whatever, and, from what was said in the decision as to the alleged defectiveness of the deed,[4] it is possible that the absence of covenants was referred to. There was a prior mortgage on the premises, under

[1] Citing Morgan *v.* Richardson, 1 Camp. 40, note; Tye *v.* Gwynne, 2 id. 346; Barber *v.* Backus, Peake, 61; Phœnix Ins. Co. *v.* Fiquet, 7 Johns. (N. Y.) 383. But these cases can hardly be said to be authority for the length to which this decision goes. See Lamerson *v.* Marvin, 3 Barb. S. C. (N. Y.) 9, *infra*.

[2] Vibbard *v.* Johnson, 19 Johns. 77; Lattin *v.* Vail, 17 Wend. (N. Y.) 188; Whitney *v.* Lewis, 21 id. 131; Tallmadge *v.* Wallis, 25 id. 116; Batterman *v.* Pierce, 3 Hill, (N. Y.) 171; 2 Kent's Comm. 472; Lamerson *v.* Marvin, 8 Barb. S. C. (N. Y.) 14. "Few cases," said Sharkey, C. J., in Hoy *v.* Taliaferro, 8 Sm. & Marsh. (Miss.) 739, "have been more frequently referred to, and but few have been less regarded, than the case of Frisbee *v.* Hoffnagle." It was however approvingly referred to in James *v.* Lawrenceburgh Ins. Co., 6 Blackf. (Ind.) 525 (though the decision itself was based upon another ground), and in Cook *v.* Mix, 11 Conn. 438, which decided that the fact of the deed to the defendant being void, by reason of being made by administrators who had no power of sale, was a sufficient defence without more (see *accord.* in equity, Woods *v.* North, 6 Humph. (Tenn.) 309, cited and commented on *infra*, Ch. XV.), though the decision seems to have been directed principally to controverting the doctrine in Lloyd *v.* Jewell, *supra*, p. 555, n. 1, that the covenants themselves were a sufficient consideration.

[3] 2 Wheat. 13.

[4] "It has also been said that the deed is defective. If it be, the defendant may require a proper deed; and it is not impossible but there may be circumstances which would induce a court of equity to enjoin the judgment until a proper deed be made. But the objection to the deed cannot be examined in this action."

which a decree of foreclosure had been pronounced, but the possession had never been disturbed. "It has been argued," said Marshall, C. J., who delivered the opinion of the court, "that there is a failure of consideration which constitutes a good defence in this action. Without deciding whether, after receiving a deed, the defendant could avail himself of even a total failure of consideration, the court is of opinion, that to make it a good defence in any case, the failure must be total. The prior mortgage of the premises, and the decree of foreclosure, do not produce a total failure of consideration. The equity of redemption may be worth something, the court cannot say how much; nor is the inquiry a proper one in a court of law, in an action on the note. If the defendant be entitled to any relief, it is not in this action."

It may be observed of this case (which upon its facts was most correctly decided [1]) that at that time the law was far from being settled as to the right of the purchaser thus to defend himself,[2] and the true basis of the decision seems to rest not so much upon any distinction between a *total* and a *partial* failure of consideration, as on the ground that there being no covenants in the deed, the purchaser had already obtained what from the absence of these covenants a court of law must presume he bargained for, viz. the mere transfer of the vendor's title, such as it was, without any recourse to him in the event of its turning out defective, and hence the question of consideration was not touched. Nor if the deed had contained a covenant of warranty or for quiet enjoyment could the result have been different, for as there had been no eviction the purchaser would not have been entitled at that time to damages.[3]

[1] Hassam *v.* Dompier, 2 Wms. (Verm.) 32, is to the same effect.

[2] Thus, ten years after the decision in Greenleaf *v.* Cook, it was held by the same tribunal, in Thornton *v.* Wynn, 12 Wheat. (S. C. U. S.) 183, that a breach of warranty of a chattel was no defence to payment of its price if the sale were absolute, and there was no subsequent agreement on the part of the vendor to take back the article; but subsequently, in the cases of Withers *v.* Green, 9 How. (S. C. U. S.) 213, and Van Buren *v.* Digges, 11 id. 461, this doctrine was much modified if not overruled.

[3] In Scudder *v.* Andrews, 2 McLean, (C. C. U. S.), 464, n., the facts were very similar to those presented in Greenleaf *v.* Cook, but the decision was the other way. In an action brought on a note given for the purchase money of land in Wisconsin, the defendant pleaded that the land was part of the public domain, and had never been parted with by the United States. To this there was a demurrer. There was no evidence whatever of any covenants in the deed, but this seems to have been treated by the court as being of no consequence. "Nor is it perceived," said McLean, J., "in such a case, that it can be important

§ 332. But Frisbee *v.* Hoffnagle was substantially overruled in New York in the first case in which the opportunity occurred.[1] A defendant being sued for the purchase money of real estate which had been conveyed with a general covenant against incumbrances, pleaded the existence of a prior mortgage, which he averred was a lien upon the property, and on demurrer it was held that although the covenant was broken as soon as made, yet as the defendant had not paid off the mortgage or averred any special damage by reason of its existence, he would be at that time entitled to no more than nominal damages,[2] and judgment was entered for the plaintiff.

So in a subsequent case,[3] in an action of debt on a bond [4] given for the purchase money of real estate which had been conveyed to

whether the instrument given by the plaintiff to the defendant as evidence of title was a deed of conveyance or an agreement to convey. If the plaintiff had no title or claim to the land, which is asserted by the plea and admitted by the demurrer, the defendant has a right to set up that fact as a defence for an action on the note. Why should he be driven to his action on the warranty, if a warranty deed were given, of which however there is no evidence? . . . If the defendant had entered into the possession of the premises and enjoyed them, it would be clear that this defence could not be set up, for then there would only be a partial failure of consideration, which would not be a matter of defence." The demurrer was therefore overruled. In this case, the court, after reviewing the authorities, held that their weight inclined in favor of the position that a partial failure of consideration could not be set up as a defence. The cases cited to prove this, however, (Morgan *v.* Richardson, 1 Camp. 40; Solomon *v.* Turner, 1 Stark. 51; Tye *v.* Gwynne, 2 Camp. 346; Basten *v.* Butter, 7 East, 479; Obbard *v.* Betham, Mood. & Malk. 483; Gray *v.* Cox, 4 Barn. & Cress. 108; Laing *v.* Fidgeon, 6 Taunt. 108; Washburn *v.* Picot, 3 Dev. (N. C.) 390,) were by no means modern ones relatively to this doctrine; and see the later cases, *supra*, p. 552, n. 3.

It may be further observed of this case, that in a court of law the presumption, from the absence of covenants, must be that the purchaser was to run the risk of the title, and (as in Greenleaf *v.* Cook) the question of consideration could not afterwards arise in an action for the purchase money. The expression too that it was immaterial whether the instrument was a deed of conveyance or an agreement to convey, is at variance with the well-settled distinction between the respective rights of the parties while the contract is still executory, and after it has been executed. See *supra*, §§ 319, 320.

[1] Lattin *v.* Vail, 17 Wend. (N. Y.) 188.

[2] See *supra*, § 188.

[3] Whitney *v.* Lewis, 21 Wend. 131.

[4] It is hardly necessary to mention that by statute in New York, as in many other States, the consideration of a bond can, under some restrictions as to pleading, be inquired into to the same extent as the consideration of a simple contract. At common law, such a defence was of course inadmissible against a specialty, even in case of fraudulent representations. Edwards *v.* Brown, 1 Tyrw. 196; Wyche *v.* Macklin, 2 Rand. (Va.) 426; Franchot *v.* Leach, 5 Cow. (N. Y.) 506; *supra*, p. 553, n. 3. The only remedy was in equity. In Pennsylvania, the equitable doctrines administered in that State through the medium of common law forms established a different rule. Swift *v.* Hawkins, 1 Dall. 17; Stubbs *v.* King, 14 Serg. & Rawle, 208; Rawle's Equity in Pennsylvania, *passim*.

the defendants with a covenant to warrant and defend them in its quiet and peaceable enjoyment, they pleaded that the plaintiff was not seised in fee, but that another was the real owner, and was then claiming adversely.[1] On demurrer, judgment was given for the plaintiff, principally on the ground that the plea, being in bar, did not go to the whole consideration.[2]

Soon after came a case where, in an action of debt on a bond, the defendant pleaded that it was executed in consideration of the conveyance by the plaintiff to himself of certain town lots, by a deed in which the former covenanted that he was lawfully seised of an absolute and indefeasible estate of inheritance in fee simple, and had good right to convey them; the plea then averred that the plaintiff was not thus seised and had not a good right to convey, and therefore that the consideration had wholly failed.[3] On demurrer, judgment was entered for the plaintiff, and this was affirmed by the Supreme Court,[4] as also by the Court of Errors, in which it was held that the plea was bad upon two grounds: first, if it was to be considered as going to the whole consideration, it was bad, as not averring that the grantor had no estate or interest whatever, as the consideration had not wholly failed if the defendant had acquired any estate or interest under the deed, however small; and secondly, if intended as a plea of partial failure of consideration, it was bad because such a defence could

[1] The plea also averred that the plaintiff knew of his want of title, and concluded "and so the defendants say they have been defrauded." There were, however, no distinct allegations of any false representations, and the conclusion of the plea did not, as the court held, follow from the facts alleged in it.

[2] Frisbee *v.* Hoffnagle was in this case cited and relied on for the defendants, but its authority was rejected by Bronson, J., who, in delivering the opinion, further said that the plea furnished no ground for saying that the consideration of the bond had failed; the plea did not go to the *whole* consideration, as it alleged that the plaintiff had not *a fee*, whereas it might be that he had a life estate or a term for years. It was not alleged that there had been an eviction from the land, or indeed that anything whatever had happened since the contract was made. This made the case fall short of Frisbee *v.* Hoffnagle, where the title had been defeated by a sale under a judgment against the vendor, though even then it was thought that that case had gone too far. The third ground of the decision was, like that taken in Lloyd *v.* Jewell (*supra*, p. 555, n. 1), that the covenant was a sufficient consideration for the purchase money.

[3] Tallmadge *v.* Wallis, 25 Wend. 113. There was also a plea of *non est factum*, upon which the issue was found for the plaintiff, and damages assessed to depend upon the issue of law.

[4] The report of the case in 25 Wend. says, "The Supreme Court, on writ of error, affirmed the judgment, and in deciding the case adverted to the opinion delivered in Whitney *v.* Lewis."

not be pleaded in bar,[1] but should, under the Revised Statutes, be embodied in a notice and given in evidence under the general issue.[2]

If it be objected to this decision that the plea followed the usual form of a declaration on a covenant for seisin, and that the breach of that covenant being admitted by the demurrer, the defendant had a right to set off the damages against the contract price, it may be answered that it is by no means true that the damages for a breach of the covenant for seisin are, as a matter of course, measured by the consideration money. In those States in which the recovery of the consideration money is held to reinvest the grantor with the estate conveyed, such a rule may work no injustice;[3] but when this result does not follow, and the purchaser, having paid nothing to extinguish the paramount title, is still in possession, the amount of the consideration money is not always the measure of damages,[4] and however this may be, it seems well settled that where the failure is partial, although the purchaser may recover damages *pro tanto*, yet he cannot make use of the action on the covenant to rescind the entire contract.[5] Hence such a defence is bad, if set up in a plea which is intended to be in bar of the action, and moreover the technical rule which allows the breach of a covenant for seisin to be assigned by negativing its words generally, cannot, it is apprehended, for obvious reasons, apply to cases where the breach is to be used as a defence in another action.[6]

[1] S. P. McCullough *v.* Cox, 6 Barb. S. C. (N. Y.) 391.

[2] "If there is a total want of consideration," said Chancellor Walworth, who delivered the opinion of the majority of the court, "the defendant may either plead that defence in bar of the action, or give it in evidence under a notice, upon a plea denying the execution of the instrument declared on. A partial failure of consideration, however, cannot be pleaded in bar under these statutory provisions, for the presumption of a sufficient consideration can only be rebutted in the same manner and to the same extent as if the instrument declared on was not sealed. The defendant, therefore, instead of pleading in bar of the action, should have pleaded the general issue of *non est factum*, and given notice with said plea of the partial failure of title, for the purpose of reducing the amount to be recovered upon the bond."

[3] See *supra*, § 184 *et seq.*

[4] See *supra*, § 176.

[5] See *supra*, p. 268.

[6] It is, in general, said that a plea of set-off should be as particular as a declaration in another action, and where notice of special matter is given under a general issue plea, as a substitute for a regular plea of set-off, courts are, in general, very particular in requiring that it shall be full and precise. Although, therefore, the rules of pleading allow the breach of a covenant for seisin to be assigned in a *declaration* by merely negativing its words, and with no averment of special damage (as is required in suing in the other covenants for title),

In a later case,[1] the defendant, being sued on his bond given for purchase money, proved that the premises had, before the execution of the deed, which contained general covenants of warranty and for quiet enjoyment, been sold under a foreclosure of a mortgage given by a prior grantor, though the possession still remained with the defendant, and the court held that the defendant having received the possession from his grantor, and still retaining it, should not be permitted to draw in question the title of the latter until he had been evicted or compelled in some way to recognize the title of the mortgagee.[2]

So in a later case in that State, in an action to foreclose a purchase-money mortgage, the defence was the failure of title to a portion of the premises which had been conveyed to the defendant with covenants for seisin and of warranty, but the court held that as there had been no eviction or disturbance of the defendant's possession, the defence was inadmissible, and moreover that as to this there was no difference between the breach of a covenant for seisin and of warranty,[3] and the later cases have consistently supported this doctrine.[4]

§ 333. It would hence seem to be settled in New York, that unless there has been an eviction, actual or constructive, of the whole subject of the contract, no defence to payment of the purchase money price can be set up in a plea in bar,[5] and that such

it is apprehended that it would be held, as was substantially the case in Tallmadge *v.* Wallis, that in a *plea* the breach of the covenant and the damage which had been sustained thereby should be set forth particularly (and such was the decision in Furness *v.* Williams, 11 Ill. 238); and the more so, because such a defence is not admissible, in general, under the statutes of set-off, but is admitted either to show how much the contract price should be reduced by reason of the non-compliance with the covenant, as in Mondel *v.* Steel, 8 Mees. & Welsb. 858, or, as in New York, by way of recoupment.

[1] Lamerson *v.* Marvin, 8 Barb. S. C. (N. Y.) 11.

[2] The right of the defendant to recoup as for a partial failure of consideration, or for damages for fraud, or breach of the covenants in the deed, was not, the court observed, claimed in the answer, and was expressly disclaimed on the trial; and the defence rested upon the ground that the facts established a flat bar to the action, the case of Frisbee *v.* Hoffnagle (which, it was contended, had never been directly overruled in New York) being relied on in support of this position; but the court, after looking at all the authorities in that State, was of opinion that a failure of consideration had not been shown. If Frisbee *v.* Hoffnagle had never been questioned or doubted, the court would feel bound to follow it without question. But it had not been regarded as good authority, or at least as unquestionable, either in their own courts or those of other States.

[3] Farnham *v.* Hotchkiss, 2 Keyes, (N. Y.) 9.

[4] Parkinson *v.* Sherman, 74 N. Y. 88; Ryerson *v.* Willis, 81 id. 277.

[5] So in the case of Boone *v.* Eyre, 1 H. Black. 273, note, the plaintiff conveyed

defence must be by way of recoupment or in mitigation of damages, the circumstances themselves being contained in a notice of special matter, and given under a general issue plea.[1] What will be sufficient to entitle the defendant thus to recoup his damages, will of course depend upon circumstances. Where the only covenants are for quiet enjoyment or of warranty, nothing short of an eviction, actual or constructive, will entitle him to do so.[2] If the eviction be from a specific part of the subject of the purchase, it is apprehended that the damages *pro tanto* can be successfully set off or recouped against the contract price. And where the eviction is a constructive one, and the paramount title has been purchased by the defendant, the same rules which are enforced as to limiting a plaintiff's recovery to the amount thus paid by him will, it is conceived, be equally applied where the position of the purchaser is that of a defendant.[3]

The general principle established by this class of cases in New York, that mere absence of title will not, of itself, constitute a valid defence to the payment of securities given for the purchase money, has been very generally recognized throughout the United States, and, apart from local legislation or practice, it may be considered as settled that in cases free from fraud, the purchaser will not, when sued at law for the purchase money, be allowed to detain it, unless, in the case of a covenant against incumbrances,

to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes thereon, in consideration of £500, and an annuity of £160, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy; and the defendant covenanted that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he, the defendant, would pay the annuity. The plaintiff having declared in covenant for its non-payment, the defendant pleaded that the plaintiff was not, at the time of making the deed, legally possessed of the negroes, and so had not a good title to convey, and, on demurrer, Lord Mansfield, in giving judgment for the plaintiff, said: "The distinction is very clear, *where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other.* But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. (See also McCullough *v.* Cox, 6 Barb. S. C. (N. Y.) 390.) If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action." The same rule was applied in the case of covenants on the sale of a patent in Cutler *v.* Bower, 11 Q. B. 973.

[1] And where no notice is given, nothing short of a total failure of consideration is admissible under the general issue. Tibbets *v.* Ayer, Hill & Denio, (N. Y.) 176.

[2] Lamerson *v.* Marvin, 8 Barb. S. C. (N. Y.) 11; Farnham *v.* Hotchkiss, 2 Keyes, 9, *ubi supra.*

[3] See *supra*, §§ 141, 187.

he has so paid the amount or otherwise suffered actual loss as to entitle him to present damages; or, in the case of the covenants being those for quiet enjoyment or of warranty, there has been an actual or constructive eviction.[1]

[1] Thus, the rule has been and is firmly held in Alabama, beginning with Peden *v.* Moore, 1 Stew. & Port. 81, and continuing with Wilson *v.* Jordan, 3 id. 92; Dunn *v.* White, 1 Ala. 645; Cullum *v.* Bank at Mobile, 4 id. 21 (this was a strong case as to enforcing the right of the vendor, and is cited at length in page 603 of the fourth edition of this treatise, and it has been repeatedly approved); Starke *v.* Hill, 6 id. 785; Cole *v.* Justice, 8 id. 793; Tankersly *v.* Graham, id. 247; Knight *v.* Turner, 11 id. 639; Patton *v.* England, 15 id. 71; McLemore *v.* Mabson, 20 id. 139; Homer *v.* Purser, id. 575; Thompson *v.* Christian, 28 id. 558; Helvenstein *v.* Higgason, 35 id. 262; Hickson *v.* Lingold, 47 id. 449 (where the court said, "The principle to be extracted from all [the cases] is that where the vendee is in the possession of the property purchased, he cannot successfully resist and defeat an action for the purchase money on the ground that the vendor's title is defective, or that he had no legal authority to make the sale, or that the sale was void. In other words, that it is inequitable to permit the vendee to retain the property purchased, and not pay for it. We know of no exception to this rule in the common law courts"). Chapman *v.* Lee, 55 id. 616. The doctrines upon which the courts of equity administer relief in that State seem to be the same as elsewhere. *Infra*, Ch. XV.

In Arkansas, it is held that partial failure of consideration is the subject of recoupment as to the quantity or quality of land (which of course refers to fraudulent representations), but not as to its title. Wheat *v.* Dotson, 12 Ark. 699; Robards *v.* Cooper, 16 id. 288; Key *v.* Henson, 17 id. 254; Desha *v.* Robinson, id. 246; Goodwin *v.* Robinson, 30 id. 535 (where reference is made to the code of procedure); Crowell *v.* Packard, 35 id. 348. Nor where there is a total failure of consideration, unless there has been an eviction. McDaniel *v.* Grace, 15 id. 135. But *aliter* it would seem if the sale were void and the vendor had no power to make it. Lewis *v.* Davis, 21 id. 239; Sorrells *v.* McHenry, 38 id. 127. But the purchaser, if he seek to rescind, must restore the subject of the purchase. Benjamin *v.* Hobbs, 31 id. 151.

Salmon *v.* Hoffman, 2 Cal. 138; Norton *v.* Jackson, 5 id. 262; Peabody *v.* Phelps, 9 id. 213; Reese *v.* Gordon, 19 id. 147, where, however, it is said there must be a total failure of consideration.

Hurd *v.* Smith, 5 Col. 233, where although the defence as a whole was not sustained, there having been no eviction, yet the defendant was allowed a set-off for taxes due by the vendor, compulsorily paid by the former.

Deal *v.* Dodge, 26 Ill. 458 (where it was held that the purchaser should at once reconvey to his vendor); Vining *v.* Leeman, 45 id. 246; Whitlock *v.* Denlinger, 59 id. 96; Laforge *v.* Matthews, 68 id. 328; Cheney *v.* Bank of Chicago, 77 id. 562; Yazel *v.* Palmer, 81 id. 83 (where it was repeated that "no defence can be interposed until the parties are placed *in statu quo* by a reconveyance"); Coffman *v.* Scoville, 86 id. 300; The People *v.* Sisson, 98 id. 335; Wadhams *v.* Swan, 109 id. 46 (where it was held that a partial failure of consideration could not be shown under plea of total failure).

Whisler *v.* Hicks, 5 Blackf. (Ind.) 100; Smith *v.* Ackerman, id. 541; Buell *v.* Tate, 7 id. 55; Pomeroy *v.* Burnett, 8 id. 142; Oldfield *v.* Stevenson, 1 Ind. 153; Clark *v.* Snelling, id. 382; Streeter *v.* Henley, id. 401; Hooker *v.* Folsom, 4 id. 90; Major *v.* Brush, 7 id. 232; Laughery *v.* McLean, 14 id. 106; Small *v.* Reeves, id. 164; Starkey *v.* Neese, 30 id. 222; (in James *v.* Lawrenceburgh Ins. Co., 6 Blackf. 525, the case of Frisbee *v.* Hoffnagle was however cited and approved, though the decision itself was based upon different grounds;) Hanna *v.*

§ 334. But while on the one hand courts of law seem unwilling to allow the purchaser to detain the purchase money unless there

Shields, 34 Ind. 84 (where the covenant was for seisin, and only nominal damages were allowed where its breach was set up as a defence); Brewer *v.* Parker, id. 172 (where the defence would have been good but for the facts averred in the replication); James *v.* Hays, id. 272; Cartright *v.* Briggs, 41 id. 184; Strain *v.* Huff, 45 id. 322; Conwell *v.* Clifford, id. 392; Turner *v.* Allen, 66 id. 252 (where the defence was *res judicata*); Stratton *v.* Kennard, 74 id. 303; Gibson *v.* Richart, 83 id. 313; Bethell *v.* Bethell, 92 id. 318 (overruling Beal *v.* Beal, 79 id. 280); Marsh *v.* Thomson, 102 id. 272.

Allen *v.* Pegram, 16 Io. 163; Nosler *v.* Hunt, 18 id. 212; Gifford *v.* Ferguson, 19 id. 166; Dietz *v.* Mock, 47 id. 451; Burrows *v.* Stryker, id. 477; Watson *v.* Irish, 57 id. 184.

In Maine, two cases (Wentworth *v.* Goodwin, 21 Me. 150, and Jenness *v.* Parker, 24 Me. 289) seem to recognize the doctrine; but the former was decided more on the ground that there was no evidence of a total failure of consideration, it not being shown that the defendant had not received the rents and profits, and the latter, on the ground that the defendant had full knowledge of the incumbrance and been negligent in not taking any steps to protect himself.

Lothrop *v.* Snell, 11 Cush. (Mass.) 453; Bartlett *v.* Tarbell, 12 Allen, (Mass.) 125.

Leal *v.* Terbush, 52 Mich. 100, was somewhat analogous to this line of cases. It was an action of assumpsit for a rescission of the contract and return of the purchase money, the vendor having only a life estate, instead of a fee as had been supposed. It was held that the mistake did not go to the entire consideration, and that therefore, there being no fraud, the money could not be reclaimed in that form of action.

Brown *v.* Manning, 3 Minn. 35.

In Hoy *v.* Taliaferro, 8 Sm. & Marsh. (Miss.) 727, the defendants, who had purchased land with covenants of general warranty, proved a judgment recovered against their vendor in the Federal court shortly before the execution of the deed, and a levy and sale under it by the marshal of the district about ten years after, when the property was purchased by a stranger, and the defendants then voluntarily abandoned the possession. It was, however, held that these facts did not constitute a defence to the payment of a note given for the contract price, as, there having been no eviction, the covenants of warranty had not been broken. It was argued on behalf of the defendants that the title was divested by the marshal's sale as completely as it could have been by eviction, but the court said it had not been furnished with any authority to show that a sale either by a marshal or by a sheriff was equivalent to eviction. Manifestly, it was not so, since the original vendor might still protect his vendee by purchasing from the marshal's vendee, or it might happen that the title acquired from the marshal would not be sufficient to effect an eviction. The voluntary abandonment in this instance gave, it was said, no strength whatever to the defence. Where there had been an eviction, the defence of failure of consideration might be let in, because the superiority of the outstanding title would then be established by a judicial determination. The inquiry would then be narrowed down to a single matter of fact, susceptible of being proved by record evidence, "and," continued Starkey, C. J., "there was not a total failure for another reason; the defendants held possession under their deed for nearly or perhaps quite two years before the marshal's sale. They were not accountable for the rents and profits during that time to any one. . . . This fact, however, in the present case, is not very material when the case is considered under the general warranty; the absence of an eviction is conclusive upon the defendants." It is, however, apprehended that the receipt of the rents and profits, and the absence of accountability for them to the paramount owner, would not have defeated the right of the covenantees to recover by suing upon their covenants, but would merely

has been an eviction, actual or constructive, of the subject of his purchase, they do not hesitate to allow the defence where such

have prevented the recovery of interest on the consideration money. See *supra*, § 196. It was further said, as in Duncan *v.* Lane, 8 Sm. & Marsh. 753, that the defendants could not avail themselves of the statutory covenants implied by the words "grant, bargain, and sell," as the express covenants of warranty did away the effect of all implied covenants. This, however, which is correct law as to the covenants arising from the words of leasing, never was applied, at common law, to the case of a freehold. See *supra*, p. 434, n. 1. Duncan *v.* Lane, 8 Sm. & Marsh. (Miss.) 744; Heath *v.* Newman, 11 id. 201; Dennis *v.* Heath, id. 206 (where, in holding that the facts did not constitute an eviction, the court said, "To hold that these facts satisfied the requirements of the law would, in this and in many other instances, cause the trial of titles to land in an action of debt or assumpsit. We are not disposed thus to change the established rules of law)."

It may be observed that the objection to trying the title to land in an action for its contract price must equally apply in every case where the paramount title had not been established by a judgment of a court of record. Yet to give to such a judgment a conclusive effect would be, where the vendor had not been vouched or notified, contrary to well-established principle (*supra*, § 125), and it is apprehended that in every such case the purchaser would be bound to make out the adverse title under which he had been evicted, or to which he had yielded, with as much particularity as if suing on the covenants; and there would seem to be no greater objection to the question of title being brought before the court in the one form of action than in the other. Feemster *v.* May, 13 Sm. & Marsh. (Miss.) 277. In Wailes *v.* Cooper, 24 Miss. 232 the court, upon examination of the various decisions in relation to the relief which a vendee of lands was entitled to receive in that State on account of a failure or defect of title, considered the following rules to be clearly and explicitly established: "First, where a contract for the sale of real estate has been executed, and the vendee has received a deed with covenants of warranty and taken possession of the land, he cannot, in a case free from fraud or misrepresentation, avoid a judgment for the purchase money, either at law or in equity, on account of a defect or failure of title, unless he has been evicted. Second, if there has been fraud or misrepresentation in relation to the validity of the title or the absence of incumbrance on it, a court of law or equity, if the title be defective or incumbered, will relieve from payment of the purchase money without eviction, notwithstanding a party may have received a deed with covenants of general warranty, and gone into possession of the land. Third, where the vendee at the time of his purchase knew of the defect of title, or the existence of incumbrances on the estate, and took a deed with covenants of warranty, he cannot at law avoid a recovery, even after eviction, but must rely upon the covenants." See as to relief in equity, *infra*, Ch. XV. Winstead *v.* Davis, 40 Miss. 785; Ware *v.* Houghton, 41 id. 382. Turner *v.* McAdory, 58 Miss. 27, was a case where one who had conveyed land with warranty took the purchaser's promissory notes in part payment. The land being afterwards recovered by paramount title, the purchaser bought in such title, giving his notes to the plaintiff for part of the purchase money. Judgment having been recovered against the purchaser both on the notes which he had given to his vendor and to the plaintiff under the paramount title, he claimed to set off the amount thus paid and to be paid for the paramount title, against the amount due for balance of purchase money. But the court held that although by his purchase of the outstanding paramount title the purchaser became entitled to maintain an action against his warrantor for money paid to his use, yet that a court of law had no right, under a system where the administration of justice was divided between courts of chancery and law, to order the

an eviction has taken place. Thus where, in Massachusetts, the defendant being sued on one of his notes given for the purchase

one judgment to be credited against the other.

Mills *v.* Saunders, 4 Neb. 190, where the vendee was allowed for the incumbrance he had paid, but not for another which he had not paid.

Drew *v.* Towle, 7 Fost. (N. H.) 412, where it was held that so far as the damages were liquidated they could under the laws of that State be set off, but not where the amount had to be assessed by a jury. In Chase *v.* Weston, 12 N. H. 415, the defendant, after the execution of the deed to him which contained "the usual covenants of warranty," mortgaged it "with the usual covenants" to one who foreclosed the mortgage, and then paid off a prior mortgage which had been executed by the vendor before his conveyance to the defendant. The court seemed to think it very doubtful whether under the authorities (Lloyd *v.* Jewell, 1 Greenl. (Me.) 352; Howard *v.* Witham, 2 id. 390; Knapp *v.* Lee, 3 Pick. (Mass.) 452; 4 Kent Comm. 472) even a total failure of consideration could be admitted as a defence, but decided the case on the ground that as the defendant had assigned the land to another, he must also be deemed to have parted with his right to the benefit of the covenants, which he would be precluded from suing on until he had satisfied the damages recovered against him by his vendee. See *supra*, § 315. But in Chaplin *v.* Briscoe, 11 Sm. & Marsh. (Miss.) 372, the deed to the defendant, after reciting that there was a small part of the premises to which the vendor had not a complete and sufficient title, provided that if the latter were unable to show a complete title to the whole of the premises at the maturity of the latest note given for the purchase money, he would remit so much per acre for the portion to which he could show no title. Soon after, the defendant sold the land, without covenants, to a third party, and being sued on the last of the notes, the above facts were given in evidence, and also that there was a paramount owner in possession of part of the premises. The plaintiff argued that the defendant had assigned with the premises all his right under the covenants, but the court held that the assignment to the third party was not a waiver of the right reserved to the defendant. It was not a thing that could pass to a purchaser, and the defendant's right stood precisely as it did before his assignment.

Failing *v.* Osborne, 3 Or. 498.

Evans *v.* McLucas, 12 S. C. 56. The existence of an outstanding mortgage executed by the plaintiff was set up in an action on a purchase-money mortgage. The deed had contained the general covenant of warranty in use in South Carolina since the act of 1795, prescribing a simple form of conveyance by release; but while this covenant was construed as practically including a covenant against incumbrances, the court said, "It is very clear in all the authorities that no damage can be recovered until the vendee has either extinguished the incumbrance in whole or in part; and in that case to the extent of payment for the purpose and interest, or unless he has lost the land in whole or in part under such incumbrance."

This was not always the South Carolina doctrine, for while its courts of equity have adopted the rules enforced elsewhere (Whitworth *v.* Stuckey, 1 Rich. Eq. 407; Van Lew *v.* Parr, 2 id. 337; Maner *v.* Washington, 3 Strob. Eq. 171; Kibler *v.* Cureton, Rich. Eq. Cas. 143; Gillam *v.* Briggs, id. 432, *infra*, Ch. XV.), yet in the common law courts the rights of the purchaser were for a long period protected, upon what was thought to be equitable principles, at the expense of the vendor. Since Furman *v.* Elmore (A. D. 1819, reported in a note to Mackey *v.* Collins, 2 Nott & McC. 189), it has been the settled law of South Carolina that a covenant of warranty possessed also the properties of a covenant for seisin, and an eviction was not therefore considered necessary to its breach. Hence it was held that if a purchaser, when sued for the contract price, could establish to the satisfaction of the jury that he took nothing by his purchase and that he would be ousted by

money of land which had been conveyed "with the usual covenants of seisin and warranty," proved that his vendor's title had

the paramount title, they might find a verdict for the defendant, not on the ground that the failure of title was a rescission of the contract, but because the damages on the covenants were exactly equal to the purchase money and interest; and it followed that when a portion of the land was so covered by paramount title damages could be assessed *pro tanto* (Farrow *v.* Mays, 1 Nott & McC. 312; Hunter *v.* Graham, 1 Hill, 370; Van Lew *v.* Parr, 2 Rich. Eq. 337; Jeter *v.* Glenn, 9 Rich. 378); and such is the law at the present day. But there was another class of cases which, beginning with Gray *v.* Handkinson (1 Bay, 278) in 1792, established the doctrine that where the object of the purchase was defeated, either by a failure of part of the title or of some incident to the purchase, the purchaser could be relieved at law by a rescission of the contract, although he might be still in possession. Such a doctrine, which it was held was a sort of equitable defence, cognizable as well at law as in equity on the ground of fraud, continued to prevail until the year 1829, when the courts began to retrace their steps, and by a series of decisions (Carter *v.* Carter, 1 Bail. 217; Bordeaux *v.* Cave, id. 250; Westbrook *v.* McMillan, id. 259; Johnson *v.* Purvis, 1 Hill, 326, where it was said that the case of Gray *v.* Handkinson was an interpretation unknown to the common law) established the position that if the purchaser had not been evicted, the contract would not be rescinded in a court of law, principally on the ground that such a court has not the power to do full and adequate justice to the parties; and the result of the cases was said by Johnson, Ch., in Van Lew *v.* Parr, *supra*, to be "that in actions brought for the purchase money the purchaser may make a clear subsisting outstanding title the ground of abatement for the contract value of such part of the premises as it may cover." In Hodges *v.* Connor, 1 Spears, 120, where it appeared that the purchaser, who was sued for his purchase money, had received from his vendor a good equitable title and had the means of compelling the conveyance of the legal estate, it was held that there was no defence to the plaintiff's claim. The proposition quoted above from Van Lew *v.* Parr must of course be understood only as applying to cases in which the covenants include the adverse title. Thus in Evans *v.* Dendy, 2 Spears, 10, and Rogers *v.* Horn, 6 Rich. Eq. 362, such a defence was refused, because in case of a sale by an ordinary or a commissioner in equity, no warranty of the title could be exacted. The current of authority in South Carolina was fully explained in Van Lew *v.* Parr, and the opinion of the court was quoted at length in the fourth edition of this treatise, p. 612. See also the cases noticed in Means *v.* Bricknell, 2 Hill, 143, and Abercrombie *v.* Owings, 2 Rich. 127.

Dix *v.* School Dist., 22 Verm. 309.

The codes of Kansas (Comp. Laws, c. 80, § 94, p. 618), Kentucky (Code of 1883, §§ 95, 96, p. 22), Minnesota (Rev. Stats. 1878, ed. 1881, c. 66, §§ 96, 97, p. 721), and Wisconsin (Rev. Stats. 1878, §§ 2655, 2656, pp. 725, 726) contain liberal provisions in regard to set-off and counter-claim, but the decisions under them all seem to recognize the necessity of eviction or some actual damage to bring the case within the code. Scantlin *v.* Anderson, 12 Kan. 85; Chambers *v.* Cox, 23 id. 393; Butt *v.* Riffe, 78 Ky. 353; Pryse *v.* McGuire, 81 id. 608; Loury *v.* Hurd, 7 Minn. 356; Walker *v.* Wilson, 13 Wis. 552; Hull *v.* Gale, 14 id. 54; Eaton *v.* Tallmadge, 22 id. 526. The facts in Scantlin *v.* Anderson were peculiar. Four heirs joined in a conveyance with the executors, who attempted to transfer the interest of the fifth heir, a minor, by executing the deed for him. The deed had general and special covenants, including one of "good and lawful authority to sell and convey the same." The notes in suit were given for the purchase money to the executors as individuals. Although the defendant still retained the title to four fifths of the land, and the possession of the whole of it, he was allowed to set off the failure of title as to the one fifth, and this, although

been defeated by a judgment recovered against him, under which, shortly before the trial, the defendant had been evicted, the court

the heirs who were also covenantors were not parties to the suit. The reason given is, however, perfectly in accord with the rule stated in the text. After reviewing the cases, the court said, "The great weight of authority undoubtedly is that if the amount of the failure, total or partial, can be determined exactly by mere calculation, then the defence may be made available. This rule covers the present case. The exact amount of the consideration for the land is known, and the amount of the failure is precisely one fifth of the entire consideration of the land."

The case of Akerly *v.* Vilas, 21 Wis. 88, might seem an exception to the rule, as, the court said (p. 109), "Before the code, it was well settled that in suits brought to foreclose mortgages for the purchase money, in which the mortgagor, being in possession of the lands, set up a partial failure of title as a defence, without averring an actual eviction or an action of ejectment brought, or that he was in any way disturbed in his possession, the court would not interfere, but leave him to his action at law. But the code allows a counter claim to be set up in an answer to a foreclosure action as well as in others. It is no objection to such counter claim or claims that the damages are unliquidated, or that the claims are legal or equitable, or both; for claims, legal or equitable for liquidated and unliquidated damages on contract, may be all set up in the same answer. The defendant, who sets up by way of counter claim a cause of action based upon the covenants in a deed, is entitled to recover the same damages as he would have recovered if he had brought a separate action on those covenants. If he declares upon the covenant of seisin, and alleges breaches, it is no defence to his claim that he is in undisturbed possession of the premises. He has a right to recover his actual damages, whatever they may be, the same as in suit at law before the code." As, however, the defendant had apparently never been put in possession of the premises in regard to which he claimed a breach of covenant, the remark about the immateriality of undisturbed possession may be regarded as a *dictum*, and however this may be, it seems certain that the law as stated in the text is now well settled in Wisconsin. Noonan *v.* Ilsley, 22 Wis. 27; Mechlem *v.* Blake, 22 id. 495; Eaton *v.* Lyman, 30 id. 41; Smith *v.* Hughes, 50 id. 620; Clementson *v.* Streeter, 59 id. 429; Bardeen *v.* Markstrum, 64 id. 613; Campbell *v.* Medbury, 5 Biss. (C. C. U. S.) 35.

In Ohio, the earlier cases of Hill *v.* Butler, 6 Ohio, 216; Stiles *v.* Hobbs, 2 Disn. 571; and G. W. Stock Co. *v.* Saas, 11 Cin. S. C. 21, clearly hold to the rule stated in the text. The act of 18 April, 1870 (2 Rev. Stats. 1884, tit. i. div. 7, c. 10, p. 1214, § 5780), provides: "In actions for the recovery of purchase money of real estate by vendor against vendee, it shall be competent for such vendee, notwithstanding his continued possession, to set up by way of counter claim any breach of the covenants of title acquired by him from the plaintiff, and to make any person claiming an adverse estate or interest therein party to the action; and upon the hearing he shall be entitled to recoup, against the plaintiff's demand, the present worth of any existing lien or incumbrance thereon; and if the adverse estate or interest of the claimant is an estate in reversion or remainder, or contingent upon a future event, the court may order the vendee, with his assent, to surrender the possession to his vendor, upon the repayment of so much of the purchase money as has been paid thereon, with interest, or direct the payment of the purchase money claimed in the action, upon the plaintiff giving bond in double the amount thereof, with two or more sureties to be approved by the court, for the payment of the same, with interest, if the defendant or his privies be subsequently evicted by reason of the defect."

In Templeton *v.* Kraner, 24 Ohio, 554, this act was held to be remedial only, not impairing the contract between vendor and vendee, but authorizing the claimant of the adverse estate to be made a party, so as to determine the question of a breach of covenant, and giving the vendee a right to

allowed the defence, and said that the plaintiff might meet it by showing that the title was good, or that the land at the time of the eviction was worth less than the consideration, and thereby entitle himself to recover the difference, but without evidence to this effect, he ought to be entirely barred of his action.[1]

So, too, in Mississippi, in an action on a promissory note for a balance of purchase money of land sold to the defendant's testator with covenants of warranty, the defendant proved that soon after the purchase it was discovered that the vendor had no title what-

demand of his vendor the performance of his covenants. In Purcell *v.* Heeny, 28 id. 39, it was held that there could be no defence under the statute on account of an outstanding title, unless its validity were first established as provided thereby, and that independently of the statute an eviction or other damage must be shown.

The Missouri statute (1 Rev. Stats. 1879, § 3725, p. 634) provides: "Whenever a specialty or other written contract for the payment of money, or the delivery of property, or the performance of a duty, shall be the foundation of an action or defence, in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of consideration, in whole or in part, of such specialty or other written contract." Under this, it was held in Ash *v.* Holder, 36 Mo. 163, that a defendant who has bought in an outstanding title can set off the costs and expenses of such purchase, and in Stewart *v.* Hadley, 55 id. 235, that where there was a partial failure of title, there should be a proportionate deduction from the balance due on the note in suit; but in Wellman *v.* Dismukes, 42 id. 101, there was stated to be "authority for the doctrine that a vendee of land who has received a deed with covenants of warranty, and been let into possession, cannot, when sued at law on the notes given for the purchase money, set up the defence of failure of consideration without showing an actual eviction." The statute, therefore, does not seem to have caused any divergence from the general rule.

[1] Knapp *v.* Lee, 3 Pick. 452. The decision in this case seems to have been to some extent based upon the insolvency of the party liable on the covenants; see as to this, *infra*, Ch. XV.

In Rice *v.* Goddard, 14 Pick. 293, where the defendant in an action brought to recover unpaid purchase money had been evicted under a title paramount to that of the plaintiff, it was held that the failure of title was total, and that the former was entitled to a verdict. In this case, as in Knapp *v.* Lee, *supra*, the argument for the plaintiff was chiefly based upon the assumption that the covenants themselves were a sufficient consideration for the payment of the purchase money, but this the court repudiated, and denied the authority of Lloyd *v.* Jewell, 1 Greenl. (Me.) 353, which had been decided on that ground; see *supra*, p. 555, n. 1. And the doctrine of Rice *v.* Goddard was approved in Dunning *v.* Leavitt, 85 N. Y. 30.

In the two cases of Davis *v.* Bean, 114 Mass. 358, 360, being actions on notes for the purchase money of real estate, and to foreclose a mortgage given to secure them, the existence of unpaid taxes which were a lien, was held a breach of the covenant against incumbrances, and the partial failure of consideration, a defence *pro tanto*. But in Bowley *v.* Holway, 124 id. 395, where the plaintiff, having only a life estate, had conveyed in fee with covenants of seisin, right to convey, and warranty, this partial failure of consideration was held not a defence *pro tanto*. Such a defence was said to be admissible only on sales of personal property, and that in Rice *v.* Goddard the promise to pay was held a *nudum pactum* only on account of the total failure of consideration. The former of these cases is more in the line of decision than the latter.

ever to the land, (except to a very small extent by pre-emption right,) but that it belonged to the United States, and the defendant, after a heavy loss had been sustained by the transaction, had succeeded in purchasing part of the land again from the government at the public sales, part from purchasers from the government, and pre-emption rights as to the remainder. A verdict was found for the defendant, which was sustained by the court, who held that apart from the fact that the act of Congress expressly invalidated any transfer of a pre-emption right before the issuing of a patent, there was evidence in the case sufficient to justify the belief that the parties had, on discovering the defect, considered the contract as rescinded;[1] and that as to the eviction, as the government need not resort to a suit in order to establish its title, but could obtain the possession summarily, a sale of the land by the latter carried with it such a constructive possession as amounted to an eviction,[2] and decisions to the same effect have been made in many other cases.[3]

[1] Glenn *v.* Thistle, 1 Cush. (Miss). 42. The land had been originally sold by Hyde to Leonard, the defendant's testator, who had paid part of the purchase money in cash, and given his note at twelve months for the balance. The note in suit had been also indorsed by Thistle, the defendant, who was afterwards Leonard's executor. When the defect of title was discovered, Hyde returned to Thistle (Leonard having died in the mean time) all the notes which he had not parted with, and afterwards exerted himself to procure for Thistle the title to as much of the land as could be bought to furnish him with a consideration for the payments received. It is presumed that the note on which suit was brought had been taken by the plaintiff *after its maturity*, as there was evidence of his having made inquiry whether any set-off existed against its payment.

[2] "As the title has failed," said Sharkey, C. J., who delivered the opinion, "we come next to inquire whether the defence is made complete by eviction. The deed contains but a general covenant of warranty, and it has often been decided that there is not a total failure of consideration without eviction, or something equivalent. . . . The land belonged to the United States, which does not resort to a suit to evict the possessor; he may be turned off in a summary way. It was not necessary that the government should resort to a suit to establish title. Any one in possession of public land is either a trespasser, or holds by permission of some act of Congress. And a sale of the land by the government carries with it a constructive possession; and such sale constitutes therefore a legal eviction, or certainly what is equivalent to it. But further, if any one had possession, it must have been Thistle, as executor, his wife being a joint legatee of all the real estate; and if he has entered under a paramount title, this is equivalent to an eviction, as an actual ouster was impossible under the circumstances; and such title we have said it was competent for him to acquire. But what is perhaps no less conclusive, nothing was said as to the possession. It does not appear from the record whether Leonard ever had possession. The point seems to have been overlooked."

[3] McDaniel *v.* Grace, 15 Ark. 489; Fisher *v.* Salmon, 1 Cal. 413; Slack *v.* McLagan, 15 Ill. 242 (and see the remarks on that case in Vining *v.* Leeman,

So in cases where the purchaser has been obliged to buy in the outstanding title, courts have not hesitated to allow him to deduct from the purchase money the amount paid for that purpose, provided the covenants were such that he would be then entitled to damages upon them.[1] Thus where the defendant, being sued on a note for the purchase money of land conveyed with general warranty, proved that the plaintiff had previously conveyed the land to another who was about to sue upon his title, when the defendant purchased it for a sum exceeding that of the unpaid purchase money, the court had no doubt that these facts were a defence to the action.[2] So in Indiana,[3] in an action by the indorsee of a promissory note, the defendant pleaded that its consideration was the balance of the purchase money of certain land

45 id. 248); Dodds *v.* Toner, 3 Ind. 427; Brandt *v.* Foster, 5 Clarke, (Io.) 298; Hobein *v.* Drewell, 20 Mo. 450; Tibbets *v.* Ayer, Hill & Denio, (N. Y.) 174; Blair *v.* Claxton, 4 N. Y. 529. In Nesbitt *v.* Campbell, 5 Neb. 429, the payment of a tax lien was held a defence, whether paid before or after suit brought.

[1] Thus it is observed in the most recent English treatise on the law of vendors: "After the conveyance has been executed, the purchaser may discharge out of any purchase money which remains unpaid (although secured) any incumbrances which either have been created by the vendor himself or are covered by his covenants for title; but not incumbrances paramount to his title and not covered by his covenants." Dart on Vendors (5th ed.), ch. xv. § 7.

[2] Pence *v.* Huston, 6 Grat. (Va.) 304. It may save the student some waste of time to observe that many cases are cited in the reports and occasional notes in text-books as bearing upon the subject of this chapter, which in fact have no connection with it. Thus the cases of Blanks *v.* Walker, 54 Ala. 117; Haynes *v.* White, 55 Cal. 38; Long *v.* Allen, 2 Fla. 404; McCauley *v.* Moses, 43 Ga. 577; Booth *v.* Seffold, 46 id. 278; Tyler *v.* Young, 2 Scam. (Ill.) 445; Gregory *v.* Scott, 4 id. 392; Condrey *v.* West, 11 Ill. 146; Morgan *v.* Smith, id. 194; Davis *v.* McVickers, id. 327; Thompson *v.* Shoemaker, 68 id. 256; Leonard *v.* Bates, 1 Blackf. (Ind.) 172; Wilhelm *v.* Fimple, 31 Io. 131; Stone *v.* Fowle, 22 Pick. (Mass.) 166; Peques *v.* Mosby, 7 Sm. & Marsh. (Miss.) 340; Liddell *v.* Sims, 9 id. 596; Feemster *v.* May, 13 id. 275; Wiggins *v.* McGimpsey, id. 532; Mobley *v.* Keys, id. 677; Tillotson *v.* Grapes, 4 N. H. 448; Scott *v.* Simpson, 11 Heisk. (Tenn.) 310; Chandler *v.* Marsh, 3 Verm. 162; M'Kay *v.* Carrington, 1 McLean, (C. C. U. S.) 50, were all cases of executory contracts, and of course governed by different principles from cases of contracts executed. Burton *v.* Schermerhorn, 21 Verm. 291, was a case of personal property, and it was held, affirming the doctrine in Stone *v.* Peake, 16 id. 218, that a partial failure of consideration was no defence unless the defendant offered to rescind the contract. Lawrence *v.* Stonington Bank, 6 Conn. 526, merely decides that between the original parties to a negotiable note its consideration may be inquired into, while Homes *v.* Smyth, 16 Me. 177, holds the equally familiar proposition, that if the note is in the hands of a *bona fide* indorsee before maturity and taken in the usual course of business, its original consideration cannot be inquired into.

The student must also be careful to class by themselves the cases in Pennsylvania and Texas, which will be presently referred to.

[3] Doremus *v.* Bond, 8 Blackf. (Ind.) 368.

conveyed by the payee to the defendant with "covenants of clear title and of warranty," and that part of the land was incumbered by judgments and mortgages which the defendant had, in order to prevent a sale, been obliged to pay off; the plaintiff replied that these payments had been made by the defendant after notice of the assignment of the note, but this was obviously held bad on demurrer, and judgment was given for the defendant.[1] Other cases have recognized and applied the same principle.[2]

The purchaser's remedy in equity will be considered in a subsequent chapter.[3]

§ 335. There remains but to consider the doctrine which, from an early date, has been recognized and applied in Pennsylvania,[4] and recently enforced in Texas.

The doctrine which, from an early day, has prevailed in Pennsylvania as to the purchaser's right to *detain* the purchase money after the execution of his deed by reason of an incumbrance or defect of title, is believed to be peculiar to that State, though as respects his right to *recover back* what has been already paid, the law that has been referred to as prevailing elsewhere[5] is there fully recognized and enforced. In early cases in that State,[6] the maxim of *caveat emptor*, in the sale of real estate, was adverted to; and in Dorsey *v.* Jackman,[7] the plaintiff, on paying his purchase money, took from the defendant, his vendor, a mere assignment of a commissioner's deed under a tax sale, and on discovering that it conveyed no title brought suit to recover the amount of the purchase money,[8] and under the charge of the court below obtained a verdict; but the judgment was reversed on error, on the ground that there being no implied warranty in the sale of real estate, a purchaser who had neglected to protect himself by

[1] It is presumed that the plaintiff was not a holder for value, before maturity, and without notice.

[2] Brandt *v.* Foster, 5 Clarke, (Io.) 298; McDaniel *v.* Grace, 15 Ark. 487, where it was conceived to be settled that "where a purchaser has taken a deed with general covenants of warranty, and there is a total failure of title, or an eviction or its legal equivalent, and the vendor sues for the purchase money, the purchaser may avail himself of the plea of failure of consideration, and will not be forced to pay the money and then resort to a cross action upon the covenants of his deed to recover it back."

[3] *Infra*, Ch. XV.

[4] As formerly in South Carolina, *supra*, p. 569, note.

[5] See *supra*, §§ 321, 332 *et seq.*

[6] Boyd *v.* Bopst, 2 Dall. 91; Cain *v.* Henderson, 2 Binn. 108.

[7] 1 Serg. & Rawle, 42.

[8] The plaintiff having found out the true owner, purchased the title from him, but this in the case of a deed without covenants is an immaterial point. See *supra*, § 321.

proper covenants could not in an action for money had and received recover what he had already paid; and this rule, which is in accordance with all the decisions elsewhere, has been consistently adhered to.[1] In delivering their opinions, however, two of the court suggested that a distinction might exist as to the purchaser's right to *detain* so much of the purchase money as should remain unpaid, but a definite expression of opinion on this point was, it was said, reserved until the determination of a case that had already been argued.

§ 336. That case was Steinhauer *v.* Witman,[2] decided in 1815 — the leading authority in Pennsylvania as to detention of the purchase money. The defendant's intestate, having received a deed with a covenant of warranty limited to the acts of the vendor, gave a mortgage for the purchase money, and in an action on this mortgage evidence was admitted to prove that the purchaser had been evicted from part of the mortgaged premises under a title paramount to that of the plaintiff, and of course not covered by his covenants. The admission of this evidence was assigned for error by the plaintiff, on whose behalf it was urged that to make him liable beyond the extent of his covenants would be to confound all distinction between limited and unlimited covenants, and be a violation of the agreement of the parties;[3] and the court, while admitting that if the question were new it might be difficult to answer, said: "But principles have been established which are adverse to the plaintiff's reasoning, and must be considered as the law of the land. The plaintiff does not deny that the matter offered by the defendant would have been a good defence, if the contract had rested on articles by which the plaintiff had agreed to convey, and the defendant had covenanted to pay the purchase money; and yet if these articles had only bound the plaintiff to convey with covenant of special warranty, it would have been as much against the spirit of the contract to make him responsible for an eviction under a title paramount, as it is now, after he has conveyed with a covenant of special warranty. A distinction has

[1] Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 447; Kerr *v.* Kitchen, 7 Pa. 486. It may be proper to repeat that even where there are covenants, the purchaser's rights must be asserted in an action of covenant, and not in an action of assumpsit. See *supra*, § 326.

[2] 1 Serg. & Rawle, 438.

[3] Sugden on Vendors, and Bree *v.* Holbech, Doug. 654, *supra*, p. 536, n. 1, were the authorities relied on for the plaintiff.

been established between purchasers who have paid, and who have not paid, the purchase money. Those who have paid have no relief, but those who have not paid are relieved, in case of an eviction or manifest failure of title. There is a *dictum* to this purpose by Lord Commissioner Rawlinson,[1] and the point was directly decided in an anonymous case, 2 Cases in Chancery, 19.[2] The case of Tourville *v.* Nash [3] is also worthy of consideration, although not directly in point. There the purchaser paid part of the money, and gave bond for the residue. After giving bond, and before payment, he received notice of an equitable lien on the land which he had purchased, and it was held that he should be subject to the lien, although he contended that the notice came too late, because he had no defence against the bond. But the Lord Chancellor answered, that though there was no defence at law, yet equity would, in such a case, stop payment of the money due on the bond.[4] I have reason to believe that the courts of this State have been governed by the principles of the case in 2 Cases in Chancery, 19, so that to set up a different rule now would create confusion." The judgment was therefore affirmed.

§ 337. It is familiar that the absence, for just a century, of a court of equity in Pennsylvania gave rise to the practice of exercising equitable jurisdiction through the medium of common law forms.[5] Such a practice would fully account for the application, in Steinhauer *v.* Witman, of such equitable principles as regulated the rights of the parties to contracts when *executed*, but it would not account for the application of such equitable principles as govern *executory* contracts. The difference between these two

[1] The *dictum* thus referred to is in an anonymous case in 2 Freem. 106. A bill filed to relieve a purchaser, on the ground of a fraudulent representation of value, was dismissed because of his *laches*, "and a case was cited by the Lord Keck. A purchaser brought his bill to be relieved where incumbrances were concealed, but was dismissed, for he ought to have provided against it by covenant; but it was said by Rawlinson, that if the purchaser had in that case had money in his hands, that this court would have helped him, but not after he had paid his money."

[2] This case (already cited at length, *supra*, p. 446, n. 1) has always been deemed of doubtful authenticity and authority, and even in Pennsylvania has been said to be "not worthy of a moment's consideration." Lighty *v.* Shorb, 3 Pa. 451.

[3] 3 P. Wms. 307.

[4] It must, however, be observed of this case of Tourville *v.* Nash that the contract was not executed, but executory. If it had been executed by a conveyance containing no covenant which included the lien in question, equity could not have relieved the purchaser. See *supra*, § 321.

[5] For a sketch of this Pennsylvania system, see Laussat on Equity in Pennsylvania, and the supplementary treatise, Rawle on Equity in Pennsylvania.

principles has already been referred to as a broad one:[1] before the consummation of the contract by the execution of the deed, the right of the purchaser to a title clear of defects and incumbrances is undoubted; after that time, his rights, both at law and in equity, depend solely on his covenants for title. It is obvious that the doctrine of Steinhauer *v.* Witman was to wipe out this distinction, and the result of this decision, added to that of Dorsey *v.* Jackson, of course gave a purchaser greater rights as a defendant than he could have as a plaintiff.

§ 338. The doctrine announced in Steinhauer *v.* Witman was affirmed in a case decided in 1819,[2] and although always adhered to,

[1] *Supra*, § 319.

[2] Hart *v.* Porter, 5 Serg. & Rawle, 201. The plaintiffs having brought suit in the court below on three notes given for the purchase money of land sold to the defendant with special warranty, the latter proved an outstanding title of dower in the wife of a former owner, to rebut which the plaintiffs offered in evidence a release from her husband and herself, subsequent to the commencement of the suit; which the court, under objection, admitted, and then charged the jury that as there had been no previous agreement to convey the land free from incumbrances, as the incumbrance existed at the time of the purchase made by the defendant, and as he had a full opportunity of making himself acquainted with the circumstances of the title, and accepted a conveyance without general warranty, he could not then avail himself of any defect of title as a defence to the action, and was answerable for the whole of the purchase money. Upon writ of error to the Supreme Court, it was there held that the evidence had been properly admitted, but the judgment was reversed upon the ground of the charge. The court, in referring to Steinhauer *v.* Witman, said: "As the opinion of the court in that case was unanimous, the law must be considered as settled. I will freely confess that it was not without considerable reluctance I agreed to the principle established in that case, nor did I make up my mind until I had taken pains to ascertain what had been the understanding and practice in this State for a great length of time. Being at length satisfied that the prevailing opinion among lawyers, judges, and men of business had been that until payment of the purchase money the vendee might avail himself of a defence founded on defect of title, even where he had accepted of a conveyance with special warranty only, I thought it incumbent on me not to oppose a principle in which there was nothing contrary to equity. Indeed, the objections to this principle are not founded so much on equity as on policy and convenience. For where one party intended to convey, and the other expected to receive a good title, it is but equity that the purchaser should have relief in case of any defect of title, although there was no express agreement to that purpose. Where the intent was that the purchaser should run the risk of title, there is not a word to be said for him. And such intent may be fairly inferred where he knew of the defect at the time of purchase, and made no provision against it in his agreement. Considering then that it was decided in the case of Steinhauer *v.* Witman that a purchaser not having paid his money may defend himself under a defect of title, where part of his purchase has been evicted, although he has accepted a conveyance with no more than special warranty, and considering that where there has been no eviction it would be against equity to compel payment of the whole purchase-money for a defective title, I am of opinion that the charge of the Court of Common Pleas was erroneous. The judgment therefore should be reversed. It is to be understood that this opinion is confined to the

has been qualified and explained in many subsequent cases,[1] whose result may be stated in general terms to be, that in Pennsylvania a purchaser may defend himself from payment of the purchase money by reason of a clear outstanding defect or incumbrance, unless the intention was that he was to run the risk of it.[2] Such an intention may be either matter of proof or matter of implication, and the most material circumstances are, in general, notice on the part of the purchaser, combined with the presence or absence of covenants which include the defect or incumbrance; or, in other words, as stated in a recent case, the doctrine in Pennsylvania is that "if the consideration money for land has not been paid, the purchaser, unless it plainly appear that he has

case of a purchaser who has no covenants on which he can have recourse to the seller. Where such covenants exist, it is not meant now to say at what time or in what manner the purchaser is to have his remedy on them."

It is difficult to perceive why the judgment was reversed in this case, since, by the evidence, which the Supreme Court held to have been properly admitted, it appeared that at the time of the trial the only outstanding title which was relied on by the defendant had been extinguished, and for anything that appeared upon the record a second trial must therefore have resulted similarly to the first. This case should be read in connection with Ludwick *v.* Huntzinger, *infra*, p. 585, n. 6.

[1] Thus in Friedly *v.* Scheetz, 9 Serg. & Rawle, 161, where (as also in Auwerter *v.* Mathiot, id. 403, and Weidler *v.* Farmers' Bank of Lancaster, 11 id. 134) the doctrine was held not to apply to purchasers at a sheriff's sale, Mr. Justice Duncan said: "Steinhauer *v.* Witman is not well understood. It does not go to the wild length, as some have supposed, that a man who purchases a title with all its defects and imperfections, and whose conveyance contains no covenants of warranty, is not bound to pay the bonds he has given for it. For Mr. Justice Yeates, the great advocate for the departure from the general rule, both of law and equity, of *caveat emptor* in the sale of lands, yet restrains its operations, for he puts it on a very rational principle. The obvious and plain rule, he says, is, what was the true meaning of the contracting parties? was it contemplated mutually that the purchaser should hold the land under a good title, or that he should run his chance of getting a title, and be exposed to all hazards?"

In the case of a sale by authority of the Orphans' Court, the rule of *caveat emptor* is of course held to apply. Bashore *v.* Whisler, 3 Watts, 493; also Fox *v.* Mensch, 3 Watts & Serg. 446; King *v.* Gunnison, 4 Pa. 171; Kennedy's Appeal, id. 149. So in cases of sales by sheriffs, commissioners, and the like, from the very nature of the transaction the purchaser necessarily buys at his own risk, and cannot detain the purchase-money under any circumstances by reason of incumbrances or defects of title. Friedly *v.* Scheetz, 9 Serg. & Rawle, 161, and *supra*, § 37. The converse of this rule applies in cases of partition and exchange, in both of which a warranty is implied. Seaton *v.* Barry, 4 Watts & Serg. 184 (as to which, see *supra*, §§ 276, 277). But it has been well said by Gibson, J., that "the greatest practical evil of the doctrine [of Steinhauer *v.* Witman] is that it subjects the contract to the control of a jury, prone to forget that to cut a man loose from his bargain from motives of humanity is the rankest injustice; and from this it would seem sound policy to extend it no further than it has been already carried." Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 451.

[2] See Lloyd *v.* Farrell, 48 Pa. 73.

agreed to run the risk of the title, may defend in an action for the purchase money by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty, or of right to convey, or quiet enjoyment, by the vendor or not, and whether the vendor has executed a deed for the premises or not." [1]

§ 339. The cases can perhaps be divided into three classes: —

First. Where the defect or incumbrance is unknown;

Second. Where there is a known defect or incumbrance and no covenant;

Third. Where there is a covenant against a known defect or incumbrance.

§ 340. First. Where the defect or incumbrance is unknown to the purchaser, it is of course impossible that he could have intended to run the risk of it, and hence two questions arise: first, what defects or incumbrances will entitle the purchaser to detain the purchase money; and secondly, what will be deemed an absence of notice on his part.

With respect to the character of the defect or incumbrance,[2] although it is at times said that the contract is still executory as to the unpaid purchase money, yet this must not be understood to mean that a purchaser will, after the execution of his deed, have a right to detain the purchase money in every case in which equity would refuse to decree specific performance by him. While on the one hand it is not necessary that an eviction should have taken place,[3] or the incumbrance have been paid off by the pur-

[1] Youngman *v.* Linn, 52 Pa. 413, per Woodward, C. J., cited and approved in Cross *v.* Noble, 67 id. 74, where it was also said that the coverture of the covenantor would have been a good plea to an action on the articles of agreement or the covenants in the deed, and a good replication, had the breach of covenant been pleaded as a set-off in an action upon any other distinct contract, but availed nothing in an action for the purchase money.

[2] It is scarcely necessary to say that the character of the defect or incumbrance must be lawful, as distinguished from a tortious interruption. *Supra*, § 127; Spear *v.* Allison, 20 Pa. 200.

[3] Carnahan *v.* Hall, Addison, 127; Goucher *v.* Helmbold, 1 Miles, 407; Hart *v.* Porter, 5 Serg. & Rawle, 201; Share *v.* Anderson, 7 id. 61. "The effect of incumbrances," it was said in the last case, "as showing failure of consideration, or a defect in the title, is certainly different in Pennsylvania from what it is in England; there, an eviction at law is an indispensable ingredient of a claim for relief against payment of the purchase money. Here, it is sufficient that eviction *may* take place." And this was repeated in Beaupland *v.* McKeen, 28 Pa. 130; but it was added with great correctness by Woodward, J., who delivered the opinion: "This is a very delicate ground on which to administer justice to vendors and vendees, for in determining the possibility of an eviction we have not before us the paramount

chaser,[1] yet on the other hand it will not be sufficient that the title can be shown to be merely doubtful, or the incumbrance contingent,[2] and unless its character be such as to defeat the purchase,

claimant on whose will and rights the liability to eviction depends. Possibly he has no rights, as would appear the moment he attempted to assert them — or if he have rights it is possible he may never attempt to assert them — and in either case it would be against conscience and equity to allow the purchaser to keep the land, on which so unsubstantial a cloud rests, and the price also which he agreed to pay to the party who put him into possession."

It is to be observed, however, that while eviction is not, in Pennsylvania, essential to a plea of breach of covenant, yet if the defendant has remained in possession, he cannot of course claim interest on the damages caused by the failure of title. Wacker *v.* Straub, 88 Pa. 32.

The purchaser may of course by his own acts deprive himself of his defence from payment of the purchase money, as in Gilkeson *v.* Snyder, 8 Watts & Serg. 200, where a third person having advanced money to the vendor in part payment of the purchase money upon the representations of the purchaser that he would be safe in so doing, it was held that the latter could not, in an action on a bond given for the amount thus advanced, defend himself by reason of a defect of title. So in Harper *v.* Jeffries, 5 Whart. 26, the defendants gave ten bonds, each to secure $500, for the purchase money of a house, which they soon after discovered had been previously mortgaged by the vendor to the Bank of Pennsylvania for $2,470. The vendor thereupon conveyed to the defendants other premises, in order to indemnify them from this mortgage, and the defendants at different times thereafter paid off the respective amounts of several of the bonds to the persons to whom they had been assigned by the vendor. The premises which had been conveyed by way of indemnity were afterwards sold, under prior incumbrances, for less than the amount required to satisfy them, and the house was soon afterwards sold by the bank under its mortgage for less than the amount due upon it. Under these circumstances it was held by the court, reversing the judgment below, that the defendants were not entitled to any defence from payment of the purchase money.

Mere acceptance of the deed and payment of an instalment of the purchase money before the day agreed upon for that purpose and for the delivery of possession are, however, no waiver of a defence arising from the vendor's breach of covenant in failing to give possession on account of an incumbrance. Wilson's Appeal, 1 Cent. Rep. 122.

[1] Thus in Poke *v.* Kelly, 13 Serg. & Rawle, 165, although the purchaser had actually paid off an outstanding mortgage, it was held by the court that its payment was not necessary in order to enable the defendant to deduct its amount from the purchase money. So in Roland *v.* Miller, 3 Watts & Serg. 390, where the title of the vendor was subject to charges in favor of the heirs of the former owner, a conditional verdict was found for the plaintiff, with stay of execution until releases from these heirs should have been obtained.

[2] Culler *v.* Motzer, 13 Serg. & Rawle, 356; Penn *v.* Preston, 2 Rawle, 19. "I wish to be distinctly understood," said Kennedy, J., in Ludwick *v.* Huntzinger, 5 Watts & Serg. 58, "as laying down the principle that in order to make such outstanding title a good defence in such cases, it must be clearly shown to be indubitably good, and that the land is actually claimed under it. It is proper however to observe that a different principle governs where the contract for the purchase of the land remains *in fieri*, and the action is brought on the contract itself with a view to enforce the payment of the purchase money according to its terms. There, if it should appear that the title of the vendor to the land is anywise doubtful, the vendee will not be held bound to pay the purchase money for it; Stoddart *v.* Smith, 5 Binn. 365 [and see *supra*, pp. 42, 534]; unless it should also appear that he had expressly agreed to do so. Dorsey *v.* Jackman, 1 Serg. & Rawle, 42; Pennsylvania *v.* Simms, Addison, 9." (For the point actually de-

(as for example by requiring the whole of the unpaid purchase money for its removal,) the purchaser is not allowed on this ground to rescind the contract,[1] but can only defend *pro*

cided in this last case, see *supra*, p. 575.) And these views were cited and approved in Crawford *v.* Murphy, 22 Pa. 87, Beaupland *v.* McKeen, 28 id. 131, and Youngman *v.* Linn, 52 id. 413. In Brick *v.* Coster, 4 Watts & Serg. 494, the court held an affidavit of defence insufficient because it did not allege the validity of the adverse claim, or at least the defendant's belief in their validity. So in Asay *v.* Lieber, 92 Pa. 377, an affidavit of defence alleging a covenant for the free use of a certain alley, and that the defendant had never had the use of the alley, was held insufficient as not alleging that at the time of the conveyance the plaintiff had not a good title to the alley. The remarks of Yeates, J., in Stoddart *v.* Smith, that "a man will not be compelled to pay for lands which he has purchased, though even with general warranty, where it plainly appears that he cannot obtain a good right therefor," were *obiter dicta* in the case, which was one where no deed had been executed, and they must be considered as limited to the application pointed out in Ludwick *v.* Huntzinger.

The distinction noticed in that case as to the rights of the parties while the contract is still executory, and after it has been consummated by the execution of the deed, although by no means so broad a one as exists elsewhere (see *supra*, § 319 *et seq.*), yet still is recognized to a greater extent in Pennsylvania than the language of some of the earlier cases would seem to imply. "If the vendee discovers," said Kennedy, J., in Moore *v.* Shelly, 2 Watts, 257, in speaking of an executory contract, "before he has paid the consideration or any part of it, that the property is under incumbrances which the vendor cannot discharge, he has a right to insist upon rescinding the contract, and may therefore refuse to pay for it, or to do anything on his part towards carrying it into execution." So in Withers *v.* Baird, 7 Watts, 229; Colwell *v.* Hamilton, 10 id. 413; Gans *v.* Renshaw, 2 Pa. 34 (unless the purchaser retain possession of the land and buy in the outstanding claims, in which case he will of course be compelled to pay the price agreed on, with a deduction for the amount thus paid by him, Renshaw *v.* Gans, 7 id. 117, *infra*), and this is the general principle which is everywhere observed; *supra*, p. 42. But as was said by Sergeant, J., in Magaw *v.* Lothrop, 4 Watts & Serg. 321, "If he accept a deed under the contract, the vendor may sue for the purchase money on bond or otherwise, though if it should turn out that there was a defect of title or outstanding incumbrance, he would be entitled to recover, the jury allowing to the defendant a deduction equivalent to the value. It would be no absolute bar to the action to say that at the time the action was brought the plaintiff had not conveyed a good and sufficient title, and this was the case of Hart *v.* Porter, 5 Serg. & Rawle, 201." Magaw *v.* Lothrop proceeded upon the rule in equity that in a suit for specific performance the vendor may perfect his title at any time before final decree. Where, however, the incumbrances are not removed until after suit is brought, the purchaser is entitled to costs. Poke *v.* Kelly, 13 Serg. & Rawle, 165; Withers *v.* Atkinson, 1 Watts, 248.

[1] Harper *v.* Jeffries, 5 Whart. 26, *supra*, p. 581; see also M'Ginnis *v.* Noble, 7 Watts & Serg. 454; Renshaw *v.* Gans, 7 Pa. 117; Dentler *v.* Brown, 11 id. 298; Garrard *v.* Lantz, 12 id. 192; Mellon's Appeal, 32 id. 127. In M'Ginnis *v.* Noble, *supra*, the defendant was sued on two bonds, amounting to $3,000, given for the purchase money of land, which was subject to a judgment against the vendor, under which an execution afterwards issued, and the land sold and purchased by the defendant for $750, and it was contended on his behalf that there was a total failure of consideration; but the court said, "The defence, it must be remembered, is purely equitable, and the inquiry is what would a chancellor do under such circumstances; on what terms and to what extent would he afford equitable relief? It

tanto, and the measure of damages which he will be entitled to defalk against the unpaid purchase money will be the same as that heretofore referred to as recoverable upon breaches of the covenants for title.[1]

strikes me most forcibly that all the vendee has a right to require is to be placed in the same situation he would be in had he paid the incumbrances without suit; and in that case, it must be admitted, the measure of equitable relief would be precisely the money paid, and the necessary expenses, and no more. The vendee, it is true, is in no default, because no part of the purchase money was then due, and consequently he was not *bound* to pay the incumbrances, as he had nothing in hand to pay them with. He might therefore, it is admitted, have suffered the land to be sold with a clear conscience, and if at the sale by a judicial process a stranger had purchased, no blame would be imputable to him; the defence would go to the whole consideration, for a man is not bound to pay for what he has not received. The bonds are given for the purchase money of the land, and having lost the land, without any default of his own, it would be inequitable and unjust that he should be compelled to pay any part of the purchase money. But will equity interpose further than for the purpose of protecting him against any loss he may have actually sustained? We think not."

In Garrard *v.* Lantz, *supra*, the court, after referring to the authorities just cited, said that they "establish the distinction that where the vendee himself becomes the purchaser at the judicial sale, he remains liable to the vendor for the residue of the purchase money unpaid; but if the land be sold to a stranger, this liability depends on the inquiry whether at the period of the last sale the vendee had in his hands, of the consideration of his purchase, a sum sufficient to extinguish the incumbrance." Where however the incumbrance on the land is greater in amount than the unpaid purchase money, the vendee has an obvious right to treat the contract as rescinded. Garrett *v.* Crosson, 32 Pa. 375.

[1] *Supra*, pp. 264, 574. Thus in Stehley *v.* Irvin, 8 Pa. 500, the owner of a mill and of a tavern constructed a pipe to carry water from the former to the latter. He then sold the tavern to one purchaser and subsequently sold the mill property to another. The latter had no notice of the easement, and in an action for the purchase money, it being proved that the existence of the easement would lessen the benefit of his purchase, the jury was instructed that the value of the easement might be deducted from the amount of the purchase money, and this instruction was affirmed on error. So in Beaupland *v.* McKeen, 28 id. 134, it was said by Woodward, J., in delivering the opinion of the court: "The rule that applies to damages on breaches of covenants for title is applicable here, and according to that, either party may produce evidence to show the relative value which the part taken away bears to the whole, and this, as was said by Kent, C. J., in Morris *v.* Phelps, 5 Johns. (N. Y.) 56, operates with equal justice as to all the parties to the conveyance. In Lee *v.* Dean, 3 Whart. 331, Judge Kennedy reasserted the rule with great emphasis as applicable to a case untainted with fraud, the relative value of the part to the whole is to be estimated with regard to the price fixed by the parties for the whole. [S. P. in White *v.* Lowry, 27 Pa. 255.] The whole purchase being assumed to be worth the price agreed on, what part of the price would fairly be represented by the part taken away? This was the question in Stehley *v.* Irvin, 8 id. 500, though the case is so defectively reported that the point ruled is scarcely discernible. It is competent for either party, under this rule with its limitation, to give evidence of the peculiar advantages or disadvantages of the part lost; and the inquiry should not be unduly restrained whilst it is confined to the proper point, but undue latitude was allowed to it when the cost of erecting a saw-mill on an adjoining tract was gone into." In Cross *v.* Noble, 67 id. 74, the breach set up in the

§ 341. With respect to what will be deemed to be notice on the part of the purchaser, it is now held that mere constructive notice will not be sufficient to deprive a purchaser of relief under the doctrine we are now considering.[1] In a case[2] where the land was, under a decree of the Orphans' Court, subject to a charge in favor of the vendor's co-heirs, it was argued that the purchaser had notice by the record of the existence of the incumbrance, but the court held that it was not pretended that the defendant had any *actual* knowledge of the incumbrance at the time of the agreement for the purchase, or even at the time that he received the deeds from the plaintiff. Indeed, neither of the parties seemed to have had a knowledge of the same until some time afterwards. *This being the case*, it could not be supposed that any covenant contained in the deeds was taken or inserted specially with a view to protect the defendant against the effect of it. The case then fell, it was said, within the authority of Steinhauer *v.* Witman. So where the incumbrance appeared on the face of recorded deeds which lay in the line of title, it was held that though *constructive notice* to the purchaser, it was not such *actual knowledge* as would imply the consent of the purchaser and his intention to take the risk of the title.[3] Had he taken a covenant that would have covered the defect, the implication of actual knowledge would have been irresistible.[4]

And it has been said that "Where a purchaser is only chargeable with constructive notice of a defect in the title, there is no reason for a presumption that he binds himself to pay the purchase money, no matter what may prove the defects of title. It is only when he has actual knowledge of the defect, that he is

defence was a previous outstanding lease and consequent failure to give possession, and it was held that the vendee was entitled to the rent reserved under the lease, and that his receipt of it would not preclude him from setting up the defence to the extent of his real injury, allowing for what he had so received.

[1] Banks *v.* Ammon, 27 Pa. 172.

[2] Roland *v.* Miller, 3 Watts & Serg. 390.

[3] Murphy *v.* Richardson, 28 Pa. 293. A dissenting opinion in this case will be found in 2 Phila. R. 419.

[4] Citing Fuhrman *v.* Loudon, 13 Serg. & Rawle, 386; see *infra*, pp. 592, 593. Thus in Kerr *v.* Kitchen, 17 Pa. 433, the purchaser accepted a deed which expressly referred by recital to a trust deed, giving its date and record, and which contained a covenant which included the defect, and it was held that in the absence of evidence to the contrary the purchaser must be considered to have had notice of the trusts in the deed, and to have protected himself against them by taking the covenant for quiet enjoyment. See as to this, *infra*, § 342.

presumed to waive full compliance with the covenant of his vendor." [1]

§ 342. Second. Where there is a known defect or incumbrance and no covenant, it has been already shown [2] that the rule as generally settled elsewhere than in Pennsylvania with respect to a purchaser's right to detain the purchase money is, that if the defect or incumbrance be not covered by his covenants for title, the presumption that he intended to run the risk of it is so strong as to admit of no evidence to the contrary,[3] and the purchase money cannot be detained under any circumstances into which fraud has not entered; and in the enforcement of these principles equity follows the law.[4]

§ 343. It would seem, however, that while such a doctrine has not been recognized in Pennsylvania to its full extent with respect to a defect of title, its application has been altogether denied with respect to an incumbrance. It has been said [5] that the intent that the purchaser was to run the risk of the title might be *fairly inferred* when he knew of the defect at the time of the purchase, and made no provision against it; [6] and in a subsequent case,

[1] Thomas *v.* Harris, 43 Pa. 231. When the earlier editions of this treatise were published, the law as to constructive notice had not been settled as now stated in the text.

[2] *Supra*, § 321.

[3] Where there is a deficiency in the quantity of the land conveyed, and there is no covenant that there shall be such a quantity, the purchaser cannot of course detain the purchase money. Dickinson *v.* Voorhees, 7 Watts & Serg. 357. See *supra*, § 297.

[4] In either of these cases, whether there are covenants or not, the fact of the purchaser's notice is one wholly immaterial; as, if he be entitled to damages, his notice cannot prejudice that right. *Supra*, § 88 *et seq.* But under what have been styled the equitable principles of this doctrine in Pennsylvania, it has been shown that while with respect to so much of the purchase money as has been already paid the contract is deemed an executed one, and the money cannot be recovered back unless by force of a covenant, yet that with respect to the unpaid purchase money it is still executory; or, as has been said by Yeates, J., in Steinhauer *v.* Witman, 1 Serg. & Rawle, 438, there is a *locus penitentiæ* until the money is paid. Hence must arise the question as to the real nature of the contract between the parties, and whether the purchaser agreed to run the risk of the title. In such a question, the fact of the purchaser's notice must necessarily be a principal ingredient, and the absence of a covenant does not possess the conclusive and binding effect that would elsewhere be given to it.

[5] Hart *v.* Porter, 5 Serg. & Rawle, 204, cited *supra*, p. 578, n. 2, and see the remarks on this ruling by Woodward, J., in Murphy *v.* Richardson, 28 Pa. 293.

[6] So in Ludwick *v.* Huntzinger, 5 Watts & Serg. 58, the defendant in an action on his bond, given for the purchase money of land conveyed to him with special warranty, offered to prove an informality in a prior tax sale and a want of identity of the subject of the contract with the land purported to be conveyed. The Supreme Court held this evidence properly rejected by the court below; that the evidence of a defect of title must be such as entirely to overcome that violent

Gibson, C. J., referring to this expression, emphatically repeated that where there was a known defect but no covenant or fraud, the vendee could avail himself of nothing, being presumed to have been compensated for the risk in the collateral advantages of the bargain,[1] and these words have been recently quoted with approbation.[2]

§ 344. It has however been settled that the absence of a covenant and the presence of notice do not together form a *conclusive*

presumption which arises in favor of the defendant's having received a good title for the land from the circumstance of his having, after inspecting it, approved it by accepting the deed conveying it to him, and thereupon giving his bond for the purchase money. And if the purchaser took no covenant for his protection, "it *goes strongly to prove* that he agreed and was satisfied to take the title of the vendor pretty much at his own risk." So in Ross's Appeal, 9 Pa. 497, it was said, quoting the language used in Smith *v.* Sillyman, 3 Whart. 589, that where the defect is known and not provided for, the presumption is irresistible, *in the absence of express stipulation*, that the vendee relied on his own judgment as to the soundness of the title.

[1] Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 451. "In Hart *v.* Porter," said Gibson, C. J., "it was said that where a purchaser knows of a defect or incumbrance at the time of the bargain, without stipulating for a covenant or other security against it, he necessarily consents to take the risk of it on himself. An intendment to that effect is consistent not only with the reality of the transaction, but with the analogous principle of Vane *v.* Lord Barnard, Gilb. Eq. Rep. 6 (*supra*, p. 87, n.), in which the purchaser, having taken an agreement for a special covenant against a contingency that might never happen, was not allowed to detain the purchase money as an additional security, because his consent to rely on the covenant alone was thought to be deducible from the very nature of the transaction. Is not his consent to bear a risk, known to him at the time and not provided against, equally deducible from the nature of the transaction? Not only every scrivener, but every purchaser, is aware of the value of a covenant, when a defect is known or suspected." In Beidelman *v.* Foulk, 5 Watts, 308, the question arose incidentally upon a point of evidence. Land which had been the property of an intestate was, after his death, sold with a covenant of special warranty by five of his heirs to the husband of the sixth, who brought an ejectment for a part of the premises against one who, being in possession, claimed to hold it under a prior deed from the intestate, which he alleged was meant to include that part, but which, on the face of the deed, did not. One of the heirs, being offered as a witness for the plaintiff, was rejected by the court below, on the ground that as the latter had given bonds to his vendors for the purchase money, he would, if he failed to recover the part in controversy, be entitled to a deduction for its value, and that the witness was therefore directly interested in the event of the suit. But on writ of error, Kennedy, J., who delivered the opinion of the court, held that under the circumstances the witness would be entitled to recover his full proportion of the purchase money, without any deduction whatever, notwithstanding the plaintiff should fail to recover, on the ground that the purchaser having notice of the defect had made no provision against it. And this is in accordance with the principle laid down in Fuhrman *v.* Loudon, 13 Serg. & Rawle, 386, and affirmed in Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 452, that "when the purchaser is aware of a flaw, and provides not against it, he takes the risk of it on himself." See these cases cited *infra*, pp. 592, 593.

[2] Youngman *v.* Linn, 52 Pa. 413.

presumption that the title was to be at the purchaser's risk.[1] Thus where the defendant, in an action on a mortgage given for the purchase money of land sold with special warranty, offered in evidence a paper signed by the vendor some weeks before the execution of the deed, which stated that it had been represented to him by the defendant that a third party made pretensions to part of the land — that he, the vendor, believed such pretensions to be groundless, yet for the satisfaction of the purchaser he engaged to save him harmless, if it should appear that there was any justice in the adverse claim — and then proved a loss of part of the land by ejectments under this claim, and the expenditure of various sums in their defence, it was held that the evidence was properly admitted, notwithstanding it was objected that the execution of the deed, which contained no covenant including the defect, merged all prior articles. Such a decision could not have been made if the purchaser's notice and the absence of a covenant were deemed *conclusive* evidence that he was to run the risk of the title.[2]

So it has been said in a later case, "If a purchaser knows of a defect or incumbrance when he takes his deed, without stipulating for a covenant or other security against it, the presumption is that he assumes the risk. Such a presumption is not, however, conclusive, *juris et de jure* — it may be rebutted." [3]

The result therefore is, that where there is a known *defect of title*, and no covenant which includes it, the presumption is that

[1] Drinker *v.* Byers, 2 Pa. (old Pa., not Pa. St.) 528.

[2] That the eminent judge did not mean by the expression in Lighty *v.* Shorb to say that where there was notice and no covenants, the purchaser was estopped from producing evidence to show that he did not mean to run the risk of the title, is clearly shown by the previous case of Seitzinger *v.* Weaver, 1 Rawle, 384, where he said, "The presumption of law is that the acceptance of a deed in pursuance of articles is a satisfaction of all previous covenants, and where the conveyance contains none of the usual covenants the law supposes that the grantee agreed to take the title at his risk, or else that he would have rejected it altogether." It is then said that there may be cases (and Drinker *v.* Byers comes within this class) where the acceptance of a conveyance will be but part execution of the articles, as in Colvin *v.* Schell, 1 Grant's Cas. 226, where it was said, "It is argued that the conveyance showing no warranty against this injury, there is none. Generally, we presume that the contract to convey is merged in the conveyance, but there may be incidental covenants that are not so merged. In this contract to convey there is a covenant against this very injury, and it is found that the grantee in accepting the deed did not intend to relinquish it, and it is not merged."

[3] Thomas *v.* Harris, 43 Pa. 231, citing Lighty *v.* Shorb and Drinker *v.* Byers.

the purchaser agreed to run the risk of the title,[1] but this presumption is not so conclusive as to exclude evidence to the contrary.

§ 345. But it would seem to have been also held, that where there is a *pecuniary incumbrance*, of an amount less than that of the purchase money, and payable before or at the time when the purchase money ought to be paid, no such presumption arises, and the burden of proof rests upon the vendor to show that the incumbrance was intended to be in addition to the consideration named in the deed, and that the purchaser took the land *cum onere*.

Such was the decision in Wolbert *v.* Lucas,[2] where, the plaintiff having issued a *scire facias* to recover the balance due on a mortgage given by the defendant for the purchase money of land conveyed to her with special warranty, the latter proved a mortgage given by a former owner, which had been compulsorily paid off by her, in instalments, since the execution of the deed, and produced a witness who swore that at the time of making the contract, the mortgage to be given by her to the plaintiff, being for the full value of the land, formed the whole consideration of the purchase. On the other hand, the plaintiff produced a witness who swore that the contract was that the defendant would pay the paramount mortgage — that she would be responsible for it, and would take it on herself.[3] The court below charged the jury that the only question was whether the defendant knew of the paramount mortgage at the time she purchased; for if she did, she could not claim allowance for payments made by her on that account, there being no fraud or covenant. The jury having found for the plaintiff, the Supreme Court reversed the judgment, and held that if the defendant bought the premises for the amount of the mortgage given by her to the plaintiff, and that was the whole consideration, she ought not to pay more than she contracted for; and if there was more to pay than her deed called for, the plaintiff was bound to show it satisfactorily to the jury.[4]

[1] Quoted and approved in Speakman *v.* Forepaugh, 44 Pa. 363, which however was the case of an executory agreement.

[2] 10 Pa. 73.

[3] The student may naturally here recall the words of Gibson, C. J., heretofore cited, *supra*, p. 579, n. 1.

[4] The court then went further, and added that under the evidence the defendant should have had the instruction of the

The charge of the court below doubtless proceeded upon the language used in a previous case, that "if there was a known defect, but no covenant or fraud, the vendee could avail himself of nothing;"[1] and if the Supreme Court had modified this direction by holding that these circumstances cast upon the purchaser the burden of proving that he did not intend to run the risk of the incumbrance, the decision would perhaps have followed the cases which have just been cited. But it is obvious that it went beyond these cases, and would seem to introduce the rule that where there is notice of a pecuniary *incumbrance* and no covenant, these circumstances, which elsewhere would be conclusive against the purchaser, do not in Pennsylvania even raise a *prima facie* presumption against his right to detain the purchase money, and where the evidence is contradictory, the question as to the terms of the contract is not to be left to the jury as a question of fact, but the purchaser is, in every case, entitled to detain, unless his vendor can show satisfactorily that he agreed not to do so.

This decision therefore, if capable of being supported at all, must rest upon the ground that a distinction exists between a defect of title and a pecuniary incumbrance, and as in an executory contract the purchaser has an undoubted right either to have incumbrances paid off by his vendor, or to discharge them himself and deduct the amount thus paid from that of the purchase

court in her favor, and a credit for all payments made by her under the paramount mortgage. A fuller statement of the facts of this case than appears in the report was given in the fourth edition of this treatise, p. 633. The cases, however, cited in the opinion were not similar in their circumstances to Wolbert *v.* Lucas. In Christy *v.* Reynolds, 16 Serg. & Rawle, 258, and Tod *v.* Gallagher, id. 261, the incumbrances were covered by the covenants. In Poke *v.* Kelly, 13 id. 165, no deed seems to have been executed, and if there were one, it must, under the terms of the contract, have contained a general warranty. In Withers *v.* Atkinson, 1 Watts, 236, the purchaser was ignorant of the incumbrances, relying on the vendor's statement that "there was not a judgment against him under the canopy of heaven;" the incumbrances, moreover, had been all removed by the vendor before the trial. Forster *v.* Gillam, 13 Pa. 340, turned upon misrepresentation by the vendor; there was a defect of title, and Burnside, J., who had also delivered the opinion in Wolbert *v.* Lucas, said, "A special warranty does not prevent a vendee from setting up a defence to the unpaid portion of the purchase money, and in such a case the *onus* lies on the vendor to show he bought at his own risk." This, it is apprehended, he can in general do by merely proving notice on the part of the purchaser; and if the latter has taken no covenant, the presumption arising from the presence of notice and the absence of a covenant is such as to throw on the purchaser, in turn, the burden of proving that he did not intend to run the risk of the title.

[1] Lighty *v.* Shorb; see also Wilson *v.* Cochran, 46 Pa. 230, *infra*, § 348; Youngman *v.* Linn, 52 id. 413.

money, so this doctrine must, it would seem, be applied to an executed contract, irrespectively of the terms in which it is expressed; and that although the purchaser's right, while the contract is executory, applies as well to known defects of title as it does to pecuniary incumbrances, yet the former, being insusceptible of definite valuation, are not thus to be presumed to have been excepted from the consideration.[1]

[1] Such a distinction was expressly taken by the court. "This is not like the case of Lighty *v.* Shorb, so much relied on. There the defect was on the face of the title purchased by the defendant, and the maxim of *caveat emptor* entered. Equity would not interfere, because it would have been changing the terms of the bargain. This case is very different. Here the plaintiff sold one third of the premises for the consideration of $3,000, the price he asked for the estate, and for which she gave her mortgage." It ought to be distinctly observed that in Lighty *v.* Shorb the defect was covered by the covenants. See *infra*, p. 593.

It seems impossible that the decision of the court in Wolbert *v.* Lucas could in any way have proceeded upon the ground that the consideration named in the deed was conclusive evidence of its amount, as such is neither the law of Pennsylvania nor does it generally prevail in this country. See the cases cited *supra*, § 173.

The case of Ross's Appeal, 9 Pa. 491, which was decided but a few weeks before Wolbert *v.* Lucas, may also be referred to in this connection. Patterson, having agreed to purchase a tract of land, entered upon it and partially built a furnace. He afterwards agreed to transfer his interest to Lyman, who was to succeed to all his liabilities for the purchase money, and who subsequently, by a verbal arrangement, transferred to Marshall & Kellog all his interest in the land, and made a bill of sale to them of the fixtures. Lyman and Marshall & Kellog, both having subsequently made assignments for benefit of creditors, the assignee of the former claimed a dividend out of the estate of the latter, which was resisted on the ground that there were judgments against Patterson which were liens on the fixtures sold by Lyman. But it was also proved that at the time of the purchase Marshall & Kellog knew of these judgments and consulted counsel, who advised they were not liens; and Bell, J., who delivered the opinion, said, "Marshall means that at the time of their contract with Lyman his firm had notice on the judgments recovered against Patterson, but not deeming them to be liens on the land, he disregarded them. It is obvious from this that neither of the parties imagined that Lyman had engaged to warrant his vendee's title, either to the land or the fixtures. Marshall & Kellog undertook to decide for themselves whether the judgments were or were not incumbrances; and never dreamed of looking to Lyman to guarantee them against a mistake in this particular. But apart from the direct proof, the nature of the transaction shows this to have been so. The case presents the uncontradicted fact that Marshall & Kellog were to take the place of Lyman. As already said, Lyman intended to do nothing more than to transfer to them his interest, whatever it was, in the contract. Why then should he be made answerable for incumbrances not suffered by him, any more than for a defect of title? The very character of the agreement repels such an idea, as is shown authoritatively in Smith *v.* Sillyman, 3 Whart. 598. In that case, where there was a similar arrangement, it is truly said that the presumption is irresistible, in the absence of express stipulation, that the vendee relied on his own judgment as to the soundness of the title. *The same presumption is applicable to an incumbrance.* Such an agreement amounts to a declaration by the vendee that he takes the property just as his vendor received and held it, and subject to all defects or hindrances not created by the latter." See Smith *v.* Sillyman, *infra*, p. 593, n. 4.

It may be difficult to reconcile some of the expressions in the cases; but in these,

§ 346. It has however been more recently decided, and upon great apparent soundness of principle, that the doctrine of this case will not apply where the security for the purchase money upon which the suit is brought is given by the purchaser after he acquires notice of the existence of the incumbrance.[1]

as in many other instances, the student may recur to the apt language of Gibson, C. J.: "From a series of cases, the law has become a series of principles; and to keep them in harmony with each other will conduce more to safety and certainty than would an implicit obedience in every case to precedent." Good *v.* Mylin, 8 Pa. 55.

[1] Lukens *v.* Jones, 4 Phila. 18. "The action in this case," said Hare, J., who delivered the opinion, "was on a note given for the purchase money of land; the defence, an outstanding ground-rent alleged, and so far as the testimony of the witnesses examined for the defendant went proved not to have been known at the time of the purchase. The defendant requested the judge before whom the cause was tried, to instruct the jury that the verdict must be for the defendant, in consequence of this defect of title. This request was granted, but with the proviso that the jury might look at the note which had been given for the purchase money and take its date, which was subsequent to the period at which the knowledge of the ground-rent came to the defendant, into consideration in finding their verdict; and the only question now before us is whether there was error in the instruction thus given.

"Looking at the matter on principle, and apart from precedent, it would seem very obvious that a promise by a purchaser to pay a sum certain, after a defect in or charge upon the thing purchased brought to his notice, is evidence that he bought subject to the defect, or had no right to set it up as a reason for not fulfilling his promise. In speaking of it *as evidence*, I use the word as distinguished from absolute proof, and mean to speak of it as that which, though far from conclusive, cannot be withdrawn without error from the consideration of the jury. It is however said that the case of Wolbert *v.* Lucas, 10 Pa. 73, establishes the opposite doctrine; that knowledge of an incumbrance at the time of receiving a deed for land which has been purchased, and agreeing to pay the price, is no reason why it should not be set up as a defence subsequently to a suit for the purchase money. If we look at the decision in that case, apart from the language of the judge who delivered the opinion, we shall find that the only point actually before the Supreme Court was whether the court below were right in the position that notice of an incumbrance at the time of buying precludes the right to deduct it afterwards from the purchase money, and that everything in the opinion which goes beyond this, and to the point that the jury should have been told peremptorily to find for the purchaser, may be regarded as having, more or less, the character of a *dictum*. But even if this be not so, and if Wolbert *v.* Lucas is to be regarded as establishing the general proposition that a man who agrees to give $10,000 for a house, and consummates the agreement by accepting a deed, with full knowledge that he is buying it subject to a mortgage for $8,000, can afterwards plead the mortgage as a defence to a suit for the purchase money, it can only be because the law will, under these circumstances, imply a promise by the vendor to pay off or satisfy the mortgage within a reasonable period, and consequently regards the vendee as entitled to treat its continued existence as a breach of contract, which may be set up by way of recoupment or defalcation. Seen in this aspect, the extreme position assumed in Wolbert *v.* Lucas may be reconciled with logic, if not with reason; but it ceases to be applicable to a case like the present, where the note was given for the whole amount of the purchase money long after the sale, and consequently tended to negative the idea that the purchaser was entitled to rely on the failure of the seller to extinguish the incumbrance as a default, or as giving any right to an abatement of the price. But

§ 347. Third. While on the one hand the absence of a covenant which covers a defect of which the purchaser has notice raises a presumption that he intended to run the risk of it, so on the other hand, where the purchaser has notice of either a defect or incumbrance and there is a covenant which includes it, the presumption arises that the covenant was expressly taken for protection against it, and the purchase money cannot be detained unless the covenant has been broken;[1] in other words, as has been clearly stated, "*the purchaser shall be bound to perform his engagement wherever his knowledge and the state of facts continue to be the same as they were at the time of the conveyance.*"[2] Thus where the plaintiff had conveyed to the defendant a tract of land devised to him by his father, with a covenant of warranty against each and all the

however this may be, and whether a promise to pay a specific sum of money, with full knowledge of a defect of title, is or is not evidence that the promisor believed himself, and might therefore reasonably be presumed by others, to be without right to rely on the defect as a reason for not performing his promise, there is another ground on which such a promise cannot be withheld from the jury, without error at all events, when it is, as in the present instance, put in the form of a promissory note payable *in futuro*, and consequently carries with it a new consideration in the shape of a postponement of the antecedent liability. For nothing is, as a general rule, better settled than that every ground of defence or objection to the performance of a contract is within the dominion of the party who is entitled to make it, and may be released or abandoned by him at pleasure, in obedience to the well-known maxim, *Quisquis potest renunciare juri pro se introducto.* It is indeed said in Jackson *v.* Summerville, 13 Pa. 359, that actual fraud forms an exception to the operation of this principle, and cannot be cured, nor the right of avoidance given by it waived or extinguished, by any subsequent act or agreement on the part of the party defrauded. How this is to be reconciled with the proposition, of which the books are full, that sales vitiated by fraud are voidable only, not void; that the fraud cannot be set up as against an innocent purchaser, nor even as between the original parties without restoring the consideration, and that no grossness or falsehood on the part of the seller will authorize the buyer to recover back the price on any other terms than those of restoring the property for which it is an equivalent, falls beyond the sphere of my functions to determine; nor need I inquire whether it was meant to assert that a man who has been injured by a fraud cannot put an end to his right to sue by executing a release under seal or accepting satisfaction *in pais*. For the case now before us is not a case of fraud, but of failure of consideration, and the cases of Duncan *v.* McCullough, 4 Serg. & Rawle, 485, and Chamberlain *v.* McLurg, 8 Watts & Serg. 36, expressly distinguish between such cases and those where the fraud is actual, and hold that the former may be confirmed subsequently, whatever may be the rule with regard to the latter. The objection that the waiver was without any new consideration has already been answered, and the result of the whole is that the rule which has been granted for a new trial must be discharged."

[1] Youngman *v.* Linn, 52 Pa. 413.

[2] Per Gibson, C. J., in Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 447, which was said in Murphy *v.* Richardson, 28 Pa. 293, to be "the best summary of the cases that has been given." And see Horbach *v.* Gray, 8 Watts, 497; Ives *v.* Niles, 5 id. 328; Wilson *v.* Cochran, 46 Pa. 230; s. c. 48 id. 107.

heirs of the father and all other persons, the purchaser, in an action against him for the purchase money, set up as a defence that the land was subject to certain legacies charged upon it by the father of the vendor, and requested the court to charge that if the jury believed these legacies were unpaid, he was entitled to a deduction for the amount of them; but the court charged that where the incumbrances, with all the circumstances attending them, were known to both vendor and vendee, and the latter took from the former a deed warranting particularly against those incumbrances, it was no defence to payment of the purchase money to say that the incumbrance was still subsisting, and it was left to the jury to determine whether both parties knew of these legacies charged upon the land, and whether any circumstance had occurred rendering the situation of the defendant more perilous than at the time of giving his bonds for the purchase money, and this direction the Supreme Court held to be correct.[1] So where a recital showed that the title to the land was in the wife of the patentee, who after her death conveyed it to two of his daughters and their husbands, who in turn conveyed to the vendor, giving the bond of the patentee as a security for the title, which bond was handed to the defendant when he purchased and took a deed with general warranty,[2] it was held that it was impossible to doubt[3] that the mutual understanding was that the purchase money was not to be detained as a security for the title.[4] So where the ven-

[1] Fuhrman *v.* Loudon, 13 Serg. & Rawle, 386. So in Strohecker *v.* Housel, 5 Pa. Law Jour. 327, the court charged, "If the jury believe that the eviction and all the facts connected with it were known to Housel before he bought of Strohecker, and that he took the warranty in his deed for the purpose of protecting himself against any eviction in consequence of the right of entry arising to Garber's heirs by virtue of that eviction, and believe further that nothing has occurred since the purchase to render the condition of Housel more perilous than it was before and at the time he purchased, then his defence is not sustained upon equitable principles."

[2] Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 447.

[3] In the absence, it is presumed, of evidence to the contrary.

[4] It was said, moreover, that the mercantile character of the security given for the purchase money, a draft of one of the partner vendees in the firm at twenty-two days, sufficiently attested that nothing but punctual and prompt payment was considered to stand with the contract. So in Smith *v.* Sillyman, 3 Whart. 589, a vendor entered into articles to sell certain land to one who assigned the articles to the plaintiff, who entered into articles with the defendants, in which it was provided that the first payment of the purchase money was not to be made to the plaintiff until they were fully satisfied as to the title. A deed was afterwards executed, with general warranty, by the original vendor to one of the defendants, who, it was held, could not in an action brought by the plaintiff to recover the purchase

dee accepted a conveyance which referred, by a recital, to a trust deed, giving its date and record, it was held that, in the absence of evidence to the contrary, the purchaser must be considered to have had notice of the trusts in the deed, and to have protected himself against them by the covenant for quiet enjoyment.[1] So where it appeared that the defendant, on making the purchase, was informed of an outstanding claim, and then took a deed with general warranty, it was held that his remedy must be upon his covenant, and that he could not detain the purchase money.[2] So it has been said that a vendee who takes a covenant against a known defect in the title shall not detain the purchase money as a further security against it, for the reason that the covenant would be nugatory if he did.[3]

§ 348. The rule that "the purchaser shall be bound to perform his engagements wherever his knowledge and the state of facts continue to be the same as they were at the time of the conveyance," is nowhere better shown than by the case of Wilson *v.* Cochran,[4] which, when first presented in the Supreme Court, came up on error from a judgment entered below for want of a sufficient affidavit of defence. In an action on a bond for the purchase money of land which had been conveyed with a covenant of general warranty, the defendant in his affidavit alleged an eviction from part of the premises by reason of the existence and exercise of a paramount right of way by a third person claiming under a grant

money due him set up as a defence that the title was defective, in consequence of which they failed in an attempt to recover the land by ejectment.

[1] Kerr *v.* Kitchen, 17 Pa. 433. See the case of Murphy *v.* Richardson, 28 id. 293, *supra*, p. 584.

[2] Bradford *v.* Potts, 9 Pa. 37.

[3] Juvenal *v.* Jackson, 14 Pa. 519. In Share *v.* Anderson, 7 Serg. & Rawle, 43, the vendor's title was subject to a charge in favor of his mother and sisters. At the time of making the contract of sale, he promised the purchaser that he would procure releases of these charges, but not being able to do so, the deed was executed with a covenant to indemnify against all estates, charges, incumbrances, etc., and a covenant of general warranty. Releases were afterwards obtained from all but two of the parties, and in an action to recover the purchase money the defendant set up (besides an allegation of fraud) the existence of these charges and a quit-rent, which he contended had prevented him from reselling, which was the special object of his purchase. Under the charge of the court, whose judgment was affirmed on error, the jury made a deduction for the amount of the outstanding charges, and also such arrearages of quit-rent as should be then due. "These, as being a present charge, were properly a subject of defence, on the same ground as the liens created by the proceedings in the Orphans' Court were allowed, but the vendee could not retain to meet charges accruing afterwards."

[4] 46 Pa. 229.

from the purchaser's vendor. The court below entered judgment for the plaintiff, but this was reversed by the Supreme Court, which held that this right of way was a breach of the covenant of general warranty, and such an eviction as entitled the covenantee to damages;[1] the court below had, therefore, erred in not allowing him to recover them in this action, and the judgment was reversed and a *procedendo* awarded. Upon the subsequent trial, it appeared that the defendant had purchased with express knowledge of the right of way, and the jury having found for the plaintiff (the vendor), this was sustained on error, and it was held that as the defendant had notice, the legal presumption was that he had already been compensated by reason of having paid a diminished price for the land.[2]

It may be observed of this well-decided case, that while the court say expressly that the existence and user of a paramount right of way was a breach of the covenant of warranty when the purchaser had no notice of it, yet that nevertheless this would not constitute an eviction when the purchaser had such notice; but this is hardly the correct manner of stating the proposition, for in both cases he is equally evicted, and none the less so by reason of his knowledge, but in the latter instance he is not allowed to

[1] See *supra*, § 79.

[2] 48 Pa. 107. "The case as now presented, therefore," said the court, "is that of a purchaser with a covenant of general warranty attempting to detain purchase money on account of a known incumbrance or defect. We were of opinion when the case was here before, and we still are, that a covenant of general warranty would embrace such a defect, though it be in the nature of an incorporeal hereditament, but manifestly no action could be maintained on such a covenant, and therefore purchase money cannot be detained by virtue of it, until after eviction, and the evidence here failed to prove eviction. Indeed, there could be no eviction of that which was never purchased or possessed, and therefore whilst a right of way successfully asserted against a vendee might be a breach of a covenant of general warranty if the purchaser had bought without notice of it, yet the law is that he shall perform his engagements whenever his knowledge and the state of facts continue to be the same they were at the date of the purchase. . . . If the defendant bought with the road open before his eyes, (and the necessary inference is that he intended to buy subject to the easement,) the mere enjoyment of the road is not and cannot be an eviction. He has got all that he bargained for with his vendor, and therefore he should pay as he agreed. Until he is interrupted in something conveyed to him by his vendor, and he knew the latter could not convey the road, he has no remedy on the covenant he took for his protection, and therefore no right to detain purchase money."

If it be desired to distinguish this decision from Wolbert *v.* Lucas, it may, perhaps, be thought that a distinction exists between a pecuniary incumbrance payable before the purchase money fell due, and such an incumbrance as a road or other easement.

detain the purchase money, for the reason that the possible assertion of the paramount right constituted one of the elements of the contract and was within the intention of both parties when the deed was made.

§ 349. But the very fact of the correct application of the Pennsylvania doctrine in this case demonstrates its want of logic. For if the purchaser, instead of using his covenant as a defence, had paid his purchase money and sued on the covenant, his mere knowledge of the existence of the incumbrance would, according to a cloud of authorities, have been no bar to his recovery,[1] and there are, therefore, two peculiarities of the doctrine; first, that under some circumstances the purchaser has greater rights as a defendant than he would have as a plaintiff, and secondly, that under other circumstances he has greater rights as a plaintiff than as a defendant.

§ 350. Where, however, the covenant is actually broken at the time of the suit brought to recover the purchase money, the purchaser will, on the general principles already referred to,[2] and for the purpose of preventing circuity of action, be entitled to detain the purchase money to the extent to which he would be at that time entitled to recover damages upon the covenant,[3] and he is not in such case obliged to restore the possession to his vendor before or at the time of availing himself of such a defence.[4]

§ 351. But when the purchaser's covenant is not thus actually broken, in other words, when he seeks to resist the payment of the purchase money upon the Pennsylvania equitable doctrine which we have been considering, it has been held that in cases where that purchase money is secured by a mortgage of the premises, upon which the vendor makes no personal demand against the purchaser,

[1] *Supra*, § 88. That is to say, his *mere knowledge* would not. But whether the right of way did or did not enter as an element into the contract might perhaps, according to some authorities, have been the subject of proof. *Supra*, pp. 94, 95, 107, 108.

[2] *Supra*, § 334.

[3] Morris *v.* Buckley, 11 Serg. & Rawle, 168; Christy *v.* Reynolds, 16 id. 258; Todd *v.* Gallagher, id. 261; Ives *v.* Niles, 5 Watts, 323; Poyntell *v.* Spencer, 6 Pa. 257. Morris *v.* Buckley was said by the court to come within the principle of Steinhauer *v.* Witman, but the case would probably have been similarly decided in any court, as the deed contained a general warranty, and the purchaser had never been able to get the possession, which is in general held to be a constructive eviction; *supra*, § 139. So in Poyntell *v.* Spencer, *supra*, the purchaser had, to prevent an actual eviction, taken a lease under the paramount title, which had been established by a judgment, of which his vendor, who had sold with general warranty, had notice.

[4] Poyntell *v.* Spencer, 6 Pa. 256.

but merely asks, in default of payment of the consideration money, the restoration of the property conveyed, the purchaser must either pay the purchase money or restore the possession to the person from whom he received it.[1] And it is apprehended that this result would not be affected by the fact that the purchaser had already paid a portion of the consideration money, for it will be remembered that as respects so much of the purchase money as has been already paid the law of Pennsylvania is the same as it is elsewhere[2] — there is merely a *locus penitentiæ* as to so much as is unpaid. This, however, would not apply either in cases where the covenant was actually broken, or where the purchase money was secured by a bond or note, upon which the recovery would fasten upon the purchaser a personal liability.

§ 352. Before leaving this subject, it seems proper to consider the rights of the purchaser in cases where the consideration of the purchase is an annual ground-rent, instead of a gross sum.[3] It is

[1] Hersey *v.* Turbett, 27 Pa. 424. "The defence," said Lewis, C. J., who delivered the opinion, "rests upon a defect in the title to the premises which will be noticed hereafter. The general rule is that whenever a defendant enters into possession of land under a contract with the plaintiff for the purchase of it, he will not be permitted to set up an independent title to protect a hostile possession. He must either pay the purchase money or restore the possession to the person from whom he received it. . . . This principle applies with peculiar force in an action in which the plaintiff makes no personal demand upon the defendant, but merely asks in default of payment of the consideration money the restoration of the property conveyed. A *scire facias* on a mortgage is an action of this character. It makes no personal demand on the mortgagor. He is not even liable for the costs of the suit. The judgment is *de terris*. It is to be levied exclusively on the mortgaged premises, and the sale conveys no further term or estate to the purchaser than the lands shall appear to be mortgaged for. See act of 1705, § 8, 1 Sm. 61. If neither vendor nor vendee had any title at the time of the mortgage, the latter could by no possibility pledge any title to the mortgage. It is true that equitable circumstances might exist which would call for the application of the principle that a title subsequently acquired by a vendor inures to the benefit of the vendee. This principle might apply in the case of a loan of money obtained on the faith of a representation that the mortgagor had an indefeasible estate in the premises granted in mortgage as a security for the money. But it can have no place where the mortgage is given merely as security for the purchase money, to be paid for the premises mortgaged. The purchaser at the sheriff's sale under such a mortgage gets no better or other estate than the mortgagor had in the premises at the execution of the mortgage. It would therefore be unjust, as a general rule, to involve the mortgagee in a dispute about the title, in a proceeding which only gives him or the purchaser under his judgment a right to try the title in a subsequent action for the land."

[2] *Supra*, § 335.

[3] See *supra*, § 170. The number of reported cases as to this is, it will be seen, very small. In Brown *v.* Dickerson, 12 Pa. 372, *supra*, p. 192, the question was as to breach of covenant. In Juvenal *v.* Jackson, 14 id. 519, the question turned principally upon whether the purchaser was entitled to the defence at all, as was also the case in Spear *v.* Allison, 20 id. 200.

sufficiently evident that the different form which the consideration money assumes should not deprive the purchaser of a defence in cases in which he would otherwise be entitled to it; for, as has been said, "the continuance of the rent, and the payment of it, depend entirely upon the right of the grantee to the future enjoyment of the land under the title conveyed to him by the grantor, to whom and whose assigns the rent is to be paid;"[1] and as was more recently said, "a sale on ground-rent differs from an ordinary sale only in this, that the consideration in the first is an annual sum perpetually charged on the land, instead of a gross sum paid or secured, as in the second."[2]

In the class of cases lastly referred to, viz. where the defect or incumbrance is covered by the covenants for title which the purchaser has received, and they are broken at the time of suit brought, it has been seen that the latter can, upon general principles, detain the purchase money to the extent of the damages to which he would be then entitled if he were suing as plaintiff for a breach of the covenants. Where, however, the consideration is a ground-rent, the amount of these damages would probably, in most cases, exceed that of the annual rent, and under these circumstances it is apprehended that unless the defect of title or incumbrance went so far as totally to defeat the entire estate conveyed, the defendant would be entitled, under the Pennsylvania statute of set-off,[3] to a certificate in his favor for the excess of these damages over the amount of ground-rent claimed by the plaintiff. Where, however, the defect of title or incumbrance had totally defeated the entire estate, it is conceived that such a result would simply work a complete extinguishment of the ground-rent. These results, however, it should be again observed, must, it is conceived, be confined to cases where the defect or incumbrance is covered by the covenants, and the latter are actually broken.[4]

[1] Franciscus *v.* Reigart, 4 Watts, 116, per Kennedy, J.; and see also Ingersoll *v.* Sergeant, 1 Whart. 357.

[2] Juvenal *v.* Jackson, *supra*, per Gibson, C. J.

[3] The statute of 1705, 1 Purdon's Dig. 603, pl. 1 (ed. 1885).

[4] Thus in Garrison *v.* Moore, 1 Phila. 282, one of the defendant's pleas "alleged that he had been obliged to pay a large sum of money for the prior and better title, as well as the costs of the ejectment," which was held bad on demurrer, for the court said, "There was here no covenant of general warranty nor for quiet enjoyment except as against persons claiming under the grantor. Purchase money cannot be recovered back for defect in the title, unless there was fraud or warranty. The same principles which govern an action must apply to a set-off, and as neither fraud nor warranty is al-

Where, however, such is not the case, and the defence is, under the peculiar doctrine of the Pennsylvania decisions,[1] an equitable one, resting upon failure of consideration, although there can be no certificate found in favor of the defendant, yet he will, it is apprehended, be entitled to defend from payment of the ground-rent, within the limits defined in the classes of cases already referred to,[2] so long as the defect or incumbrance remains. "If," as has been said, "the grantor of the land, his heirs or assigns, be evicted and deprived of the enjoyment of the land by any one having a title paramount, the rent ceases and becomes extinct."[3] So where there is an eviction of a specific part of the premises, the rent will be apportioned *pro tanto*.[4] And if the purchaser have removed the defect or incumbrance, or be otherwise entitled to the equitable defence referred to, it is conceived that he would be entitled to detain the ground-rent for successive years, until its arrearages should be equal to the amount of his loss.[5]

leged, the matter contained in the plea cannot be available to the defendant *as a set-off* to the plaintiff's claim in this action." See also the distinction between a cross demand and failure of consideration, noticed in Good *v.* Good, 9 Watts, 572, *infra*.

[1] *Supra*, § 335 *et seq.*

[2] *Supra*, §§ 170–188.

[3] Franciscus *v.* Reigart, *supra*, p. 598, per Kennedy, J.

[4] Garrison *v.* Moore, *supra*. "We are of opinion," said the court, "that the second plea, of an eviction by a prior and better title from three tenths of the demised premises, is, *pro tanto*, a defence to an action for the rent, which in such case ought to be apportioned."

[5] See as to this the case of Good *v.* Good, 9 Watts, 567, explained in 3 Watts & Serg. 472. The purchase money was there secured by seven bonds and a promissory note. In an action on the first of the bonds, the purchaser established a failure of consideration as to part of the land, and also claimed a set-off for the services rendered to the vendor to an extent exceeding the amount of the bond, and the jury found a general verdict for him. In a subsequent action on another of the bonds and the note, the defendant rested upon the same grounds, and the plaintiff urged that the evidence of the recovery by the defendant in the previous suit, and the grounds on which it was based, was a bar to the allowance of the same defence in a subsequent suit, but the court below decided otherwise, and the jury found for the defendant, and certified that there was due him from the plaintiff $2,500 over and above the amount claimed by the latter. The judgment was however reversed by the Supreme Court, which held that as respects the set-off, that must be presumed to have been passed upon by the former jury, "who must be deemed to have sustained the bond in the first instance, holding it to be satisfied by the set-off and no more. As to what was properly cross demand, therefore, the defendant was concluded; but we must be careful to distinguish it from what was properly failure of consideration. As a ground of demand, the one is legal and independent of the plaintiff's cause of action; the other is equitable, inherent in all the securities founded on the same consideration, and therefore applicable to successive actions on any of them, till the defendant is compensated by defalcation to the extent of the loss. In this instance the defendant claimed the promise of his compensation for personal services and damages, for a breach of a covenant that a particular es-

It is hardly necessary to repeat that the preceding cases in Pennsylvania must, with the exception of this last class, be regarded as exclusively local in their application.

§ 353. In Texas, all distinction between law and equity has been abolished by the Constitution.[1] In an early case in that State, the defendant, in an action for the purchase money of real estate which had been conveyed to his ancestor by the plaintiff, pleaded a total failure of title but did not aver an eviction, and the court, in recognizing and following the authority of the decisions in South Carolina and Pennsylvania, said, "The vendee must, by competent and sufficient evidence, establish the existence and validity of the outstanding title, but when that is done there is no reason why his remedy should be delayed until disturbed in the enjoyment of the land, and this even when the defendant is in possession."[2] The leading case however in that State is Cooper

tate of dower in the land had been released, and they were settled in the previous action at what they were worth. But for failure of consideration the defendant is entitled, on the whole, to a deduction equal to the average value of the acres lost, determined by the price originally stipulated, . . . and he is entitled to an allowance in this action for any part of it which has not been allowed him before."

When the case went down again for trial, the court below conceived that in the proper application of these remarks the failure of consideration must be apportioned among the securities ratably, and directed the jury accordingly, but this judgment was reversed on error (3 Watts & Serg. 472), and it was said, *per curiam*, that the effort of the judge who delivered the former opinion was "merely to distinguish between the remedy for want of consideration and the remedy for cross demand — not to establish a principle of apportionment, in a case involving the latter, between distinct securities for different parts of the original debt. The case did not call for it. It was indeed said that want of consideration furnishes a defence which is inherent in all the securities till full compensation for it be attained by defalcation; and so indeed it is, so far as to dispense with a certificate of balance where the amount to be defalcated exceeds the sum sued for. . . . The principle of *pro rata* distribution of defalcation for failure of consideration among all the securities is one which this court did not mean to establish."

[1] Texas Constitution of 1875, art. 5, § 8. The provision was the same in the earlier constitutions.

[2] Tarpley *v.* Poage, 2 Tex. 139. "On what ground," said the court, "could proof of the defence set up in the answer be refused? It may possibly have been on the ground (and this supposition receives some countenance from the argument of the appellant in this court) that the defendant had not been judicially ejected from the premises, and that until eviction the defence was unavailable. But why should the defendant be postponed until actual eviction, when redress would very frequently be hopeless? Where the vendor has impliedly or expressly warranted his authority to sell, and it appear afterward that his title is intrinsically defective, or there is sufficient evidence of a valid subsisting outstanding title in others, it would operate with great injustice to compel the purchaser to pay the purchase money, and then, after final eviction consequent on a harassing litigation of the title, to institute a new action on the covenants of the conveyance against the vendor."

v. Singleton, where, in an action on a note given for the purchase money of land which had been conveyed with a covenant of general warranty, the defendant pleaded an outstanding title as to one half thereof, but did not allege that an eviction had either taken place or was threatened, and upon demurrer the court held, after commenting upon the Pennsylvania cases,[2] that such allegation was not necessary, for "where there was clearly no title in the vendor, the purchaser is not compelled to pay and then after eviction seek his remedy on the covenants of his deed;" but it was also held that the vendee must clearly prove the existence of the outstanding title and his own want of knowledge of the defect at the time of his purchase, and as the plea was not sufficiently certain in these respects the demurrer was sustained,[3] and it was further said, that in the case of a total or partial failure of title, the vendee should offer to reconvey the land, or that portion of it to which the title had failed.[4]

This case has been consistently followed, and it is well settled in

[1] 19 Tex. 260.

[2] *Supra*, § 335 *et seq.*

[3] "After the title has been passed," said the court, "and the deed executed, the purchaser cannot, according to the doctrine in England and in most of the States, resist the payment of the purchase money on the ground merely of defect or failure in the title. Where there have been no fraudulent representations on the part of the vendor as to the title, the general rule is that the vendee under a deed must pay the purchase money, and rely upon the covenants in his warranty for redress; and if there be no fraud and no covenants, he is not entitled to any relief. But such is not the rule as recognized by the courts of this State. The doctrine in Tarpley *v.* Poage, 2 Tex. 139, is to the effect that though there may be a deed with covenants of warranty, yet the vendee may resist the payment of the purchase money in cases where the title has turned out to be wholly defective, or there be a valid outstanding title in others; that where there clearly was no title in the vendor, the purchaser is not compelled to pay, and then, after eviction, seek his remedy on the covenants of his deed, especially where the vendor is or may probably be insolvent or beyond the reach of the court. The rule in that case is not upon the ground of fraud in the vendor, but of such failure of title as exposes the vendee to danger, or in fact to the certainty of eviction. The plea in the case on hand avers the title of the vendor to be defective, but does not state when that fact came to his knowledge. He alleges merely defect of title, and he certainly should aver, in order to show that he has equity, that he did not know of the defect at the time of sale. If he be exempted from the necessity of abiding eviction, and then resorting to his covenants, he should aver such facts as would in equity and justice entitle him to relief; . . . and if he have a deed with warranty, he ought not to be released from payment, unless in case of fraud on the part of the vendor, or of defect in the title not known to the vendee at the time of sale. He cannot be required to prove a negative, but he can prove the facts and circumstances of the sale, and if from these no inferences arise that the purchase was to be at his risk, and no proof establishing such fact is offered by the vendor, he ought to be let into his defence."

[4] See Demaret *v.* Bennett, 29 Tex. 263, and *infra*, Ch. XV.

that State that a vendee may, before eviction, detain the unpaid purchase money whenever there has been a total or partial failure of title, but in order to entitle him to this relief he must prove beyond doubt that there is a paramount title under which he is liable to be evicted,[1] and it must also clearly appear that he was ignorant of its existence until after the delivery of his deed,[2] for if he purchased with knowledge of the defect, he will be compelled to await an eviction and then rely upon the covenants.[3]

[1] Woodward *v.* Rodgers, 20 Tex. 176; Cook *v.* Jackson, id. 209; Johnson *v.* Long, 27 id. 21; Demaret *v.* Bennett, 29 id. 263.

[2] Brock *v.* Southwick, 10 Tex. 65; Herron *v.* De Bard, 24 id. 181; Bryan *v.* Johnson, 39 id. 31; Carson *v.* Kelley, 57 id. 379.

[3] Demaret *v.* Bennett, 29 Tex. 263. The result of the authorities was thus stated in this case: "A purchaser who has gone into possession under a deed with warranty, without any notice of a defect in the title, may resist the payment of the purchase money, by showing his title to be worthless, and the existence of a superior outstanding title by actual ouster, or, what is tantamount to the same, an indisputable superior outstanding title and that he is liable to be evicted. But when the purchaser goes into possession under a deed with warranty, and with notice of the defects in the title, there are no equitable grounds upon which he can withhold the purchase money for failure of the title, for the transaction still remains as the vendee understood it to be at the date of the purchase, and he will be forced to await eviction and then rely upon the covenants in his warranty for the damages arising from the breach of the same." The later cases of Bryan *v.* Johnson, 39 Tex. 31, Price *v.* Blount, 41 id. 472, and Norris *v.* Ennis, 60 id. 23, are all in accord with this doctrine.

CHAPTER XV.

THE JURISDICTION OF EQUITY AS TO COVENANTS FOR TITLE.

§ 354. Covenants for title, like all other covenants, are of course mere contracts between the parties, though their savoring of the realty gives them certain incidents denied to others. For a breach of contract, the common law provided a single remedy, a recompense in damages; and as in many cases this proved insufficient, the jurisdiction of equity has become established in certain well-defined cases, administered through the means of specific performance, injunction, and the reformation and rescission of contracts. And as the jurisdiction in these cases was originally engrafted on the common law by reason of the insufficiency of its forms of remedy, so, somewhat curiously, the common law recompense in damages has in England in our own day been engrafted by statute upon the jurisdiction of equity, by reason of the occasional insufficiency of the form of remedy which equity affords.

§ 355. This has been brought about by a series of recent statutes. Of these, the first was the "Chancery Amendment Act, 1858,"[1] commonly called Lord Cairns' Act. It provided that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct;" it also provided the machinery for the assessment of damages and the trial of questions of fact, either by a jury before the court itself, or by the court alone, or for the assessment of damages by a jury before any judge of one of the superior courts of common law at Nisi Prius, or before the sheriff of any county or city.

[1] 21 & 22 Vict. c. 27.

In the construction of this act, which was not retrospective, it was held that it did not extend the jurisdiction of the court to cases where there was a plain common law remedy, or where the court would not have interfered before its passage,[1] and further, that where the plaintiff failed to establish any covenant, contract, or agreement of which specific performance could be decreed, the court had no jurisdiction to grant relief in damages.[2] Where, however, the court had jurisdiction to grant specific performance, it might award damages for non-performance of part of the contract in respect of which it could not have compelled specific performance.[3] But it was considered that a plaintiff would not be entitled to damages if he had done any act which would deprive him of his right to specific performance,[4] and that it was in the discretion of the court whether it would award damages under the act, or leave the plaintiff to obtain them at law,[5] and this, notwithstanding the subsequent act of 25 & 26 Vict. c. 42,[6] which provided that "in all cases in which any relief or remedy within the jurisdiction of the Court of Chancery is sought in any cause instituted therein, every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court;" in other words, it was considered that as the relief in equity thereby does not depend upon the mere question of damages, the act was not compulsory.[7]

"The object of Lord Cairns' Act," says a recent writer,[8] "is to enable the Court of Chancery to do complete justice in cases where it previously had jurisdiction, but where circumstances had occurred which disabled the court from decreeing specific

[1] Wicks *v.* Hunt, Johns. 372; Rogers *v.* Challis, 27 Beav. 175; Scott *v.* Rayment, L. R. 7 Eq. 112.

[2] Lewers *v.* Earl of Shaftesbury, L. R. 2 Eq. 270, where it was said, "Where the existence of an agreement is made out, the court may think it better to give relief in damages than to perform the agreement, but the relief thus given is, by the words of the statute, 'in addition to or in substitution for' specific performance, and implies the existence of an agreement between the parties capable of being specifically performed."

[3] Soames *v.* Edge, Johns. 669.

[4] Collins *v.* Stuteley, 7 Weekly Rep. 710. But *aliter* under Judicature Acts. Elmore *v.* Pirrie (July 27, 1887), Weekly Notes, 167.

[5] Durell *v.* Pritchard, L. R. 1 Ch. App. 244.

[6] Known as Sir John Rolt's Act.

[7] Johnson *v.* Wyatt, 2 De Gex, J. & S. 18; Swaine *v.* Great Northern R. R., 4 id. 211 (which was argued by Sir John Rolt); Durell *v.* Pritchard, L. R. 1 Ch. App. 244; Mayne on Damages (3d ed.), 521.

[8] Note to Cuddee *v.* Rutter, 1 Lead. Cas. in Eq. (4th ed.) 819. See also Kerr on Injunctions, 221.

performance, and so rendered it necessary for the plaintiff to seek relief in a court of law for damages. If, for instance, before the passing of the act, upon a bill being filed for the specific performance of a contract for the purchase of an estate, it appeared that the vendor could not make a title to the estate, the bill would have been dismissed, and the vendor would have been obliged to resort to a court of law for damages; under the act, the Court of Chancery is able to do complete justice between the parties, by the award of adequate damage for the non-performance of the contract."

And as the act did not diminish the rights of suitors, a plaintiff in equity, who before the act would have been allowed at the same time to sue the defendant at law for damages, may still do so, although he might, under the act, pray for and obtain damages in the suit. And where the plaintiff has established his right to a perpetual injunction against the defendant, the court has no power under the act to oblige him, against his will, to accept damages in lieu of the injunction.[1]

§ 356. Then came the familiar series of statutes known as the Judicature Acts, introducing, as they did, such thorough changes in the English system. In the first of these statutes, passed in 1873, it was provided that in every civil cause or matter commenced in the High Court of Justice, law and equity shall be administered by giving to any plaintiff claiming equitable relief, or any relief founded upon a legal right, such relief as ought to have been given by the Court of Chancery before the passage of the act, and by giving to any defendant claiming any equitable estate or right, or relief upon any equitable ground against any right or claim of the plaintiff, the same effect by way of defence as the Court of Chancery ought to have given before the passage of the act.[2]

[1] Krehl *v.* Burrell, L. R. 11 Ch. Div. 146. "It was not intended," said James, L. J., "and never could have been intended by the legislature, in giving a right to damages under Lord Cairns' Act, to compel a man who is wronged, to sell his property to the person who has wronged him. No such right as is claimed by the appellant can exist in this country unless specially given by act of Parliament. If it were otherwise, the consequence would be that a person would have a right to do a wrong to his neighbor, at a price to be fixed by the court." It may be suggestive in this connection to contrast such a decision with some American cases which practically, under circumstances not very dissimilar, deprive a covenantee of his option. See *supra*, §§ 179, 253.

[2] Act of 36 & 37 Vict. c. 66, § 248, L. R. 8 Stat. 306.

This act of 1873 was followed by supplementary statutes, extending down to the year 1883.[1]

In the construction of these statutes, it was, however, held that they did not repeal the Chancery Amendment Act of 1858.[2]

§ 357. Then came the "Statute Law Revision and Civil Procedure Acts" of 1881[3] and 1883,[4] the latter of which declared that "the enactments described in the schedule to this act are hereby repealed, subject to the exceptions and qualifications mentioned in this act and in that schedule," and among the enactments in the schedule was "21 & 22 Vict. c. 27, The Chancery Amendment Act." But the "exceptions and qualifications" thus referred to were in these words: "The repeal effected by this act shall not affect . . . any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured by or under any enactment repealed by this act."

In a case arising before the passage of this act, Pierson, J., had applied to it the principle of Lord Cairns' Act.[5] An appeal was taken, and pending it, the act of 46 & 47 Vict. was passed. Lord Justice Baggalay, in delivering the opinion affirming the court below, said: "Our attention was called to the fact that Lord Cairns' Act had been repealed since the former hearing of this case, being included in the schedules to the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), but that act contains words preserving the jurisdiction of the court, notwithstanding the repeal. By section 5, it is enacted that any jurisdiction, or principle, or rule of law or equity, established or confirmed, or right or privilege acquired, by or under any enactment repealed by the act, shall not be affected by the repeal. It is not, however, necessary to have recourse to Lord Cairns' Act, for it is clear that the court now has power to give damages as

[1] The statutes constituting what are known as the Judicature Acts are, besides the Act of 1873, the Act of 38 & 39 Vict. c. 77 (1875), L. R. 10 Stat. 759; Act of 39 & 40 Vict. c. 59 (1876), L. R. 11 Stat. 380; Act of 40 Vict. c. 9 (1877), L. R. 12 Stat. 113; Act of 42 & 43 Vict. c. 78 (1879), L. R. 14 Stat. 361; Act of 44 & 45 Vict. c. 68 (1881), L. R. 17 Stat. 385; and Act of 46 & 47 Vict. c. 29 (1883), L. R. 19 Stat. 95.

[2] Fritz *v.* Hobson, L. R. 14 Ch. Div. 542; Bowen *v.* Hall, L. R. 6 Q. B. Div. 333; Wilson on Judicature Acts (4th ed.), 32.

[3] 44 & 45 Vict. c. 59, L. R. 17 Stat. 359.

[4] 46 & 47 Vict. c. 49, L. R. 19 Stat. 225. Of these two statutes, the latter was the broader in effect.

[5] Sayres *v.* Collyer, L. R. 24 Ch. Div. 180.

alternative relief. Before Lord Cairns' Act was passed, a plaintiff who wished to enforce a restrictive covenant had two remedies; he might come into a court of equity for an injunction to restrain an infringement of his right, or he might have recourse to a court of common law to obtain damages, and Lord Cairns' Act gives the courts of equity the power of giving a plaintiff damages by way of alternative relief. But since the Judicature Acts, each division of the court has full power, apart from Lord Cairns' Act, to give either an injunction or damages." [1]

§ 358. As to the specific performance of contracts, the maxim of the civil law, *Nemo potest præcise cogi ad factum*, is equally the doctrine of the common law in England.[2] That law (save in the case of replevin, which is scarcely an exception) affords, as has been said, but one compensation for every loss, viz. money. But as from a very early day it was felt that though one shilling might be as good as another, yet one estate in land, though of precisely the same market value as another, might be vastly different in every other circumstance that made it an object of desire, the doctrine was established as early as the time of Richard the Second, that a court of equity had jurisdiction to enforce the specific performance of contracts for the sale of land.[3] The Year Books tell us that this jurisdiction was not asserted without opposition on the part of the common law judges,[4] but, at least as early as when Brooke's Abridgment was published, it seems to have been fully established.[5]

[1] Sayers *v.* Collyer, L. R. 28 Ch. Div. 103.

[2] Fry on Specific Performance, 1.

[3] 1 Spence's Eq. Jurisd. of the Court of Chancery, 645.

[4] 21 Hen. VII. pl. 41; 22 Hen. VI. pl. 43.

[5] Brooke's Abr. Trespass on the Case, pl. 72. Thus in Doctor and Student (which was published in 1518) it is said, "If a man sell his land by a sufficient and lawful contract, though there lack livery of seisin, or such other solemnities of the law, yet the seller is bound in conscience to perform the contract. In this case, the *contract* is sufficient." Dialogue 1, c. 21, p. 63.

With respect to chattels, also, such as had a peculiar and intrinsic value, not to be measured by money, the same rule was applied at an early day; and we find cases as far back as the reign of Henry V. when such a jurisdiction was exercised, till in the leading cases of Pusey *v.* Pusey, and Duke of Somerset *v.* Cookson, 1 Lead. Cas. in Eq., decided respectively in 1684 and 1735, the doctrine was placed beyond question. This, too, was not without question and opposition by the common law judges, who claimed that an action of detinue was the proper remedy, even although — while the judgment recognized the plaintiff's *right* to recover the thing *in specie* — the delivery could not, on refusal, be enforced, but damages only. 1 Spence's Eq. Jurisd. 646.

A curious modern illustration of the doctrine as applied to personal property occurs in the decisions in the Southern States as to slaves, where, after much

"There is no pretence," says a learned author, "for the complaints sometimes made by the common lawyers, that such relief in equity would wholly subvert the remedies by actions on the case and actions of covenant; for it is against conscience that a party should have a right of election whether he would perform his covenant, or only pay damages for the breach of it. But on the other hand, there is no reasonable objection to allowing the other party, who is injured by the breach, to have an election either to take damages at law or to have a specific performance in equity, the remedies being concurrent but not coextensive with each other." [1]

§ 359. But while it is easy to state this as a general proposition, it will be found that from an early time much difficulty has been and is still felt in its practical application.

Thus, for example, the enjoyment of land may greatly depend upon the specific performance by another of his covenant to build thereon, and in some early cases such performance was decreed; [2] but more lately the doctrine has been denied and specific performance refused, for it is said, if one will not build, another may.[3]

On the other hand, the performance of a covenant to levy a fine or for further assurance may be indispensable to the security of the title, and none can perform it but the party bound by the covenant,[4] and it is obvious that a recovery in damages affords, at most, an uncertain if not inadequate recompense.

§ 360. So there may be cases of covenants sounding in damages, in a strict sense, whose performance will sometimes be enforced on principles of *quia timet*. Thus in the early case of Ranelagh *v.* Hayes,[5] the plaintiff assigned certain shares of the

discussion and some variety of decision, the weight of authority settled upon the ground that although as a general rule no distinction would be observed between a slave and any other chattel, yet when there were peculiar circumstances which gave a *pretium affectionis* — such as a slave being a family servant, a carpenter, a blacksmith, or the like — specific delivery would be enforced. See the American notes to Cuddee *v.* Rutter, 1 Lead. Cas. in Eq.

[1] Story's Eq. Jur. § 717 *a*. A pertinent illustration of this has been shown in the class of cases considered *supra*, §§ 179, 258; and as has just been seen, under Lord Cairns' Act the court has no power to oblige a plaintiff to take damages against his will, when he has established his right to specific equitable relief. *Supra*, p. 605, n. 1.

[2] Story's Eq. Jur. § 725.

[3] Id. § 726.

[4] Id. § 729. Some text-writers include under this head the specific performance of covenants *not* to do a certain thing, as not to build and the like; but equity here interferes by injunction rather than by specific performance.

[5] 1 Vern. 189 (1683); s. c., but less full, 2 Cas. in Ch. 146; 1 Eq. Cas. Abr. 17.

excise in Ireland to the defendant, who covenanted to save him harmless in respect of that assignment, and to stand in his place touching the payments to the King,[1] and the plaintiff, being sued by the King for £20,000, filed his bill that the defendant might be decreed to perform his covenant *in specie*. It was insisted on behalf of the latter, that here was no proper subject for equity nor anything that the court could decree, for here was no specific covenant, but only a general and personal covenant for indemnity which sounded only in damages, which could not be ascertained in this court,[2] especially as this case is, there being no breach of the covenant assigned in the bill, for a suit being brought by the King was not in itself any breach; the defendant would defend the suit, and if nothing was recovered there was no breach. But Lord Keeper Guilford "thought fit to decree that the defendant should perform his covenants, and directed it to a master, and that *toties quoties* any breach should happen he should report the same specially to the court, and the court then might, if there should be occasion, direct a trial at law in a *quantum damnificatus*, and he conceived it reasonable that the defendant should be decreed to clear the plaintiff from all these suits and incumbrances within some reasonable time,[3] and he compared it to the case of a counter bond, where, although the surety is not troubled or molested for the debt, yet at any time after the money becomes payable the court will decree the principal to discharge the debt—it being unreasonable that a man should always have such a cloud hang

[1] In the report in 2 Cas. in Ch. the covenant was stated to be "to save the Lord Ranelagh harmless touching three parts of *a farm* assigned to Hayes." It will of course be remembered that the excise in Ireland, created by the excise act of Charles II., was farmed out by the king, and part of the covenant, which is given in the note to the report in Vernon, was, that he, the defendant, should indemnify the plaintiff from all accounts, payments, charges, and actions whatsoever on account of any moneys due by the plaintiff, the then late farmer of his Majesty's revenue in Ireland, for rent or otherwise. The care with which the jurisdiction was exercised will appear by the notes to the report: "The Lord Keeper gave as one reason for his decree, 'that the computation of damages in such a cause must depend upon examination of long and intricate accounts of the revenue of Ireland, which cannot be made upon a trial at law, and a jury cannot foretell what damages will after happen, but must give their verdict upon uncertainties, which will after occasion suits in this court';" and it was also ordered "that upon any suit or demand against plaintiff upon any matter relating to the said farm, he should give timely notice to the defendant or his clerk in court, to the intent defendant may take all necessary care in defence thereof, to prevent any damage that may come to him thereby."

[2] Since altered by Lord Cairns' Act, *supra*, p. 603.

[3] See as to this at law, Lethbridge *v.* Mytton, etc., *supra*, § 74.

over him;" and other cases, on both sides of the Atlantic, have seemed to recognize the same doctrine.[1]

§ 361. This class of cases must not, however, receive a broad application. So far as they rest on the doctrine of *quia timet*, it has been well said of this head of jurisdiction, that "though it is one which a court of equity has often exercised, yet it will be extremely tender in so doing, because it materially varies the agreement of the parties at the time of the transaction." [2] And

[1] Lee *v.* Rook, Mosely, 318; Pember *v.* Matthers, 1 Bro. Ch. 52; Burroughs *v.* McNeill, 2 Dev. & Bat. Eq. (N. C.) 297; Griffin *v.* Orman, 9 Fla. 22. In Gibson *v.* Goldsmid, 5 De Gex, M. & G. 757, where there were (in a conveyance after dissolution of partnership) covenants by both parties, the fact that the plaintiff might have broken his own covenant of indemnity did not prevent the court from enforcing a covenant for further assurance. In Hatton *v.* Waddy, 2 Jones (Ir. Chan.) 541, on a conveyance of a portion of premises all of which were subject to a quit-rent, the vendee covenanted with the vendor, his heirs and assigns, to pay the rent on the whole property, and this was enforced against a volunteer claiming under the former, in favor of the assignee of the portion originally retained by the vendor. In Power *v.* Standish, 8 Ir. Eq. 526, a father gave certain mortgaged premises to his second son, and other premises to his eldest son, who covenanted to pay the incumbrance on his brother's property. A mortgagee of the eldest son's property, with notice of the covenant, was compelled to fulfil it without claiming contribution from the second son.

In Champion *v.* Brown, 6 Johns. Ch. (N. Y.) 398 (where is an able opinion by Kent, Ch.), the plaintiffs, administrators whose intestate had contracted to purchase land, assigned the contract to the defendants, who covenanted to take up and cancel it, or, if this could not be done, to indemnify the plaintiffs from all loss by reason of it. It was held that the plaintiffs were entitled to specific performance, and the defendants could not set up *in limine* that the plaintiffs could not be damaged by reason of the contract, because they had no assets.

But in Lloyd *v.* Dimmack, L. R. 7 Ch. Div. 398, the plaintiff asked for a judgment declaring that the defendants were bound to indemnify in respect of breaches of covenants in a lease according to its terms, and giving liberty to apply from time to time, as breaches of the indemnity might occur; but Fry, J., in his opinion, suggested that such a judgment would be highly inconvenient, as requiring from time to time the interference of the court over the whole residue of a term of ninety-nine years, and added: "In the next place, I am not aware that with the single exception of the case of Ranelagh *v.* Hayes, 1 Vern. 189, any authority can be produced for a judgment of that description. That is a case which I believe has never been actually followed. It has been cited over and over again, but the industry and learning of the counsel for the plaintiff have not enabled them to produce a single case in which a decree has been made declaring the right to indemnity, and giving liberty to apply from time to time. Therefore, upon the ground of the great inconvenience of such a judgment, and looking at the fact that no decree can be produced, from the time of Ranelagh *v.* Hayes down to the present time, and looking at the not very clear report of that case and the difficulty of ascertaining the exact circumstances, and especially what was the duration of the liability in respect of which that indemnity was declared, I feel myself bound to say that I cannot make such a declaration, or give such a general liberty to apply."

[2] Flight *v.* Cook, 2 Ves. 620, per Sir T. Clarke, M. R.

as nothing is better settled, at least in this country, than that upon the ordinary covenant against incumbrances a plaintiff can recover but nominal damages unless he has suffered actual loss [1] — in other words, that the covenant is treated as a covenant of indemnity in the strict sense of the word — so it will be found that equity follows the law, and that as a general rule no preference is given to the covenant against incumbrances over any of the other covenants for title,[2] and that relief will not be granted upon the mere apprehension of damage. Thus in a case in New York, the complainant's bill set forth the existence of a quit-rent upon the land which had been conveyed to him with all the covenants for title, and prayed that the defendant might be decreed to pay and satisfy it and have the same cancelled of record, and hold the plaintiff harmless therefrom, to which the defendant demurred, on the ground that the purchaser's remedy was at law upon the covenants, and the court dismissed the bill, saying: "It is said, however, that a court of equity will decree the performance of a general covenant of indemnity, though it sounds only in damages, upon the principle on which they entertain bills *quia timet*. Whether this be so or not, the difficulty is that there is here no covenant of indemnity in the proper sense of the term. In one sense, all the usual covenants in a deed may be termed covenants of indemnity; that is, they are designed to protect the purchaser to a certain extent against the failure of title, or an eviction, or against incumbrances; but they afford an indemnity in no other way than every other contract or agreement does, viz. by the right to recover damages for the breach or non-performance, and this deed contains no other than the usual covenants." [3] So in Ohio, where the defendant conveyed to the complainant with covenants that he was the lawful owner, had good right to sell, and of warranty, and the latter filed a bill setting forth that a widow had obtained an assignment of dower in the premises, for

[1] *Supra*, § 188 *et seq.*

[2] Except, of course, that for further assurance, as has been just seen.

[3] Tallman *v.* Green, 3 Sandf. 437. In the late case of Rector of Trinity Church *v.* Higgins, 48 N. Y. 532, it was held that a lessor might recover an assessment laid upon the demised premises which the lessee had covenanted to pay, notwithstanding the lessor had paid nothing; but in Reading *v.* Gray, 37 N. Y. Super. Ct. 79, that decision was said to be based on the ground that the covenant was affirmative and not collateral, and a distinction was drawn between a promise and an indemnity (as to which see *supra*, § 74), and that where the assessment had not been paid, only nominal damages could be recovered.

the payment of which a certain annual charge had been imposed upon the land, and prayed a specific performance of the covenants, the bill was dismissed, the court saying: "There is a well-established chancery jurisdiction over certain covenants. The Chancellor will exercise a restraining power where the covenantor, contrary to his stipulation, disturbs the tenant by his own act, and he will enforce the specific performance of the covenant for further assurance. But we find no case of interference on this side of the court in relation to the covenant of warranty." [1] Other cases have proceeded upon the same rule,[2] and any in which a different course has been taken must be deemed to rest upon their peculiar grounds.[3]

§ 362. As to the covenant for further assurance, the rule is somewhat different. It is not a mere allegation that the title is good — that there is no incumbrance — not a mere promise to respond in damages if the other party should be evicted; it is a specific undertaking to execute such particular deed or deeds as may be necessary for the better and further assurance of the title to the purchaser. If performed, it may make a doubtful title marketable; if unperformed, who can measure the damages to be recovered at law? Who can measure by money the difference between the value of a title good to keep, and yet not good to sell?

And hence it will be found that from an early day, courts of equity have enforced the specific performance of covenants for further assurance.

Thus where in the last century, a tenant in tail executed a mort-

[1] Tuite *v.* Miller, 10 Ohio, 382.

[2] Thus in Watkins *v.* Owen, 2 J. J. Marsh. (Ky.) 142, the complainant had received a deed with covenant of warranty, and filed his bill, setting forth that a suit was threatened by adverse claimants and praying that their titles be examined and damages assessed against his covenantor should his title fail, which was dismissed by the court, as not showing any fraud or mistake, or that his remedy on the covenant would be ineffectual. A somewhat similar decision was made in Bradford *v.* Long, 4 Bibb, (Ky.) 225.

[3] Thus in Barnett *v.* Montgomery, 6 Mon. (Ky.) 327, the covenant was peculiarly framed. There had been an exchange of land with a covenant, giving, in case of eviction, the election to either party to restore the land taken in exchange or pay its value. "It did not, therefore," the court said, "leave the amount of the liability of the warrantor to the conclusions of law upon the general expressions of the covenant, but fixed the nature and extent of his liability." There were also other circumstances in the case which rendered the interposition of equity necessary. The case is referred to at length in the fourth edition of this treatise, p. 655, note.

gage in fee with a covenant for further assurance, and then became bankrupt, whereby his estate became vested in his assignees in bankruptcy, it was held that the latter might be compelled either to redeem the mortgage or to convey to the mortgagee the fee simple into which, by the operation of the bankrupt law, the estate tail had been turned.[1] So where tenant in tail conveyed his estate in fee simple for the benefit of his creditors, with a similar covenant, and afterwards became bankrupt, his assignees were ordered to convey the fee to the trustees of the assignment.[2]

In these cases, it need hardly be said that the remedy at law, whether by action of covenant against the bankrupt or by proving as for a debt against his estate in the hands of his assignees,[3] would be utterly inadequate.[4]

So where a grantor, having no interest in certain lands, conveyed them in fee with covenants for the title, including one for further assurance, and afterwards acquired the very estate which he purported to convey, it was held that the grantee could maintain a bill to compel a conveyance of the subsequent title.[5]

So where the defendant agreed to assign shares in a foreign gas company to the complainant, and covenanted to do such other and further acts as might be necessary to effectuate the transfer, the Lords Justices held, upon a bill filed for the specific performance of the agreement, that the defendant was bound under his covenant to perform certain formal acts required by the laws of the country in which the company was located, and which were necessary to be performed in order to vest the shares in the complainant.[6]

So in an early case in Virginia, a married woman, tenant in tail, joined with her husband in conveying the estate, with covenants for quiet enjoyment, of warranty, and for further assurance.

[1] Pye *v.* Daubuz, 3 Bro. C. C. 595; see Tourle *v.* Rand, 2 id. 650.

[2] Edwards *v.* Appelbee, 2 Bro. C. C. 652, n. It will be remarked of these cases that the tenant in tail conveyed *in fee;* had he merely purported to pass his estate tail, the decisions would probably have been different. Davis *v.* Tollemache, 2 Jur. (N. S.) 1181; *supra*, p. 421, n. 1, and *infra*, § 363. This distinction does not seem to have been very carefully observed in Fry on Specific Performance, 116, though it is noticed in Dart on Vendors (5th ed.), 809.

[3] As to this see *infra*, § 303.

[4] Of course, however, the mere insolvency of the covenantor will not of itself, and irrespective of other circumstances, *create*, however it may *fortify* an equity. See *infra*, § 380 *et seq.*

[5] Smith *v.* Baker, 1 You. & Coll. 223, *supra*, p. 133, n. 3, and p. 417, n. 1.

[6] Gibson *v.* Goldsmid, 5 De Gex, M. & G. 757.

A subsequent statute declared that tenants in tail should hold in fee simple, and the wife died after its passage but without executing the assurance, and upon a bill filed against her heirs the complainants had a decree.[1]

§ 363. Specific performance, however, will obviously not be enforced, when the result would be to enlarge the grantee's title beyond that intended to be conveyed. In Davis *v.* Tollemache,[2] for instance, the defendant, a tenant in tail in remainder, mortgaged his estate tail with a covenant for further assurance. Subsequently, the estate tail became vested in him in possession, and a disentailing deed was tendered to him for execution, in order, as was claimed, that he might comply with his covenant, and on his refusal a bill was filed to compel its specific performance, which was demurred to for want of equity. Vice-Chancellor Stuart dismissed the bill, saying, "The covenant for further assurance in a deed is a covenant intended to give full effect and operation to the estate and interest conveyed by the deed. Where it is sought to extend the operation of a general covenant of that kind to the execution of an instrument which would bar a title in others, which would continue but for the execution of the instrument sought to be executed, I have always understood that an express stipulation to that effect is necessary between the contracting parties. . . . The utmost extent to which the court has gone, with reference to covenants for further assurance, has been to extend their operation to that very estate and interest which are conveyed by the deed."[3] And as has been

[1] Nelson *v.* Harwood, 3 Call, (Va.) 342. The husband also gave a bond conditioned that the entail should be barred. Part of the decision was rested on the ground of the wife being bound, because she had conveyed with a private examination; but as to this see *supra*, § 306.

[2] 2 Jur. (N. S.) 1181, and *supra*, p. 421, n. 1.

[3] "The case of the plaintiff," said the Vice-Chancellor, "depends entirely on the force and effect to be given to general words. Now the general words in this case unquestionably extend to every estate and interest of every kind which the grantor in the deed of mortgage had. I have no doubt, as far as the intention of the parties is to be collected from the instrument, that there was no further intention than that this deed should apply to every estate and interest which could be affected by the conveyance of the grantor; and I think, under the covenant for further assurance, that of every estate to which the grantor was entitled there should be a conveyance of the same force and effect with that which was made by the general deed, and that to such a conveyance, under the covenant for further assurance, if the execution of such a conveyance be necessary to effectuate the intention of the parties, the grantee, who is the plaintiff in this suit, is entitled." In Fields *v.* Squires, 1 Deady, (C. C. U. S.) 366, 380, it was obviously held that a covenant that "if the grantors should

said in a previous part of this treatise,[1] where the other covenants are limited to the acts of the vendor, the purchaser will obviously have no right, under his covenant for further assurance, to require the removal of an incumbrance not created by the former.[2]

The doctrine of Davis *v.* Tollemache, it is to be observed, means no more than that the evidence of the intention of the parties must regulate the performance to be required of them. Thus in the very recent case of Bankes *v.* Small,[3] where a tenant in tail in remainder had disentailed without the concurrence of the tenant for life, and sold the property covenanting to execute "every such disentailing and other assurance" as the purchaser should reasonably require, and after the tenant for life died, a bill to compel the execution of a disentailing deed was filed. The defendant tried to explain away the word "disentailing," and Davis *v.* Tollemache was relied on to restrict the covenant to the bare fee which he had at the time of the conveyance; but it was held that the ultimate assurance of the entire fee by a disentailing deed had clearly been intended, and the case was distinguished from Davis *v.* Tollemache.

§ 364. The jurisdiction of equity in the specific performance of covenants for title (as of all other covenants) is, however, frequently exercised when necessary to the administration or the marshalling of assets. In such cases, as in a class already referred to arising under the bankrupt laws,[4] the satisfaction of covenants is a necessary incident to the proper adjustment and adjudication of the rights of the parties before the court, and this, whether the conveyance is voluntary or upon valuable consideration.

Thus in Williamson *v.* Codrington, a testator living in Barbadoes executed, in 1715, a voluntary settlement of his plantation in America to trustees in trust for his two illegitimate children, with a covenant of general warranty.[5] He was afterwards evicted, and died in England, and the *cestuis que trust* having filed a bill to have satisfaction of the covenant out of assets of his estate, it

obtain the fee simple from the United States they would convey it to the grantee by a deed of general warranty," did not require the grantors to convey the fee which they subsequently acquired from another source.

[1] *Supra*, § 105.

[2] Armstrong *v.* Darby, 26 Mo. 517.

[3] L. R. 34 Ch. Div. 415, and *supra*, p. 135, n. 3; affirmed on appeal, July 8, 1887, Weekly Notes, p. 141, 3 Times Law R. 740.

[4] *Supra*, § 304.

[5] 1 Ves. 511 (1750), and *supra*, § 110.

was, after careful argument and consideration, held by Lord Hardwicke that they were entitled to relief.[1]

So in Lord Thurlow's time, a testator, by a voluntary deed containing a covenant for seisin, charged his copyhold estates with the payment of an annuity to the complainant for life, and afterwards by his will confirmed the deed, and bequeathed the annuitant a legacy in money. The copyhold estates were, however, never surrendered, but descended to the heir of the grantor, and a bill being brought "by the plaintiff to be paid her legacy and to have the annuity secured,"[2] the Chancellor held that the plaintiff was a creditor by specialty,[3] and that the legacy should

[1] "The first question," said the Chancellor, "is with regard to the nature of the remedy the plaintiff has taken; for as to the other circumstances, certainly, though the conduct of this gentleman appears very extraordinary, yet when he had these children, in whatever way, or of whatever color, it was a natural duty incumbent on him to provide for them, and whatever provision was made for them, so far as they should be entitled in law or equity, the remedy must be extended for their benefit. The remedy taken is by bill for satisfaction out of assets; not insisting to follow the subject itself. Undoubtedly a bill may be for satisfaction of a debt out of assets real and personal, which debt may be created voluntarily by the testator; for although one cannot come into equity to supply a defect in a voluntary deed without consideration, or in many instances cannot come for specific performance of such an agreement, yet if he has a specialty he does not want proof of consideration, but may come into equity as well as law to have satisfaction for that debt on that specialty out of assets, and then the court will not send it to law, but will judge whether he has a specialty or not. Indeed, if it appears doubtful to the court whether it is a specialty on which an action at law could be maintained, or the damages so uncertain that it could not be settled without being tried by a jury, the court will, as in other cases, have the aid of a court of law; but unless such a necessity, will not send it to law to make two suits out of one. The plaintiff is proper to have a decree, so far as his right extends, to determine which extent the nature of the settlement and covenant therein contained must be considered. . . . But then another point arises upon the covenant, for let him intend what he will, if it is a voluntary conveyance, and he has since conveyed away the estate for valuable consideration, these children or their trustees cannot recover it back from such a purchaser, and if that was the whole of the case, there is no covenant of specialty to oblige the grantor or his estate to make it good. There is no instance where a voluntary conveyance is afterwards defeated by sale for valuable consideration that satisfaction can be demanded against him or his estate, unless for some covenant on which an action or suit might be maintained. Therefore plaintiff resorts to the clause which he insists on as a covenant from the testator entitling him to satisfaction for what was lost by eviction of the estate out of his assets, real and personal, and if it amounts to a covenant it will entitle thereto." See the remainder of the opinion, *supra*, p. 141, n. 1.

[2] Giles *v.* Roe, 2 Dickens, 570 (1780).

[3] It is well settled that a grantee under a deed containing covenants is entitled upon their breach to prove against the estate of his grantor as a specialty creditor. Earl of Bath *v.* Earl of Bradford, 2 Ves. 587; Parker *v.* Harvey, 2 Eq. Cas. Abr. 460; Fergus *v.* Gore, 1 Sch. & Lef. 107; Lovell *v.* Sherwin, 2 Eq. Rep. 329; *In re* Dickson, L. R. 12 Eq. 154, *supra*, p. 517, n. 4, and p. 523, n. 4. In the later case of

be paid, and a fund set apart out of the personal estate to answer the annuity.[1]

Nearly seventy years later, the case of Hervey *v.* Audland, where the facts were very similar to those in Williamson *v.* Codrington, came before the Vice-Chancellor's court,[2] and a different decision was made, though on a technical ground. In consideration of affection, one assigned certain personal estate in trust for his nieces with a covenant for further assurance, and his executors having refused to perform the covenant,[3] a bill was filed for the administration of the estate, but the Vice-Chancellor held, that as the question raised was a legal one, it must be decided by a court of law, and leave was granted to the petitioners to bring an action.

But in the later case of Cox *v.* Barnard,[4] satisfaction of a like covenant was decreed in a similar case. A testator had before his death made several voluntary assignments of annuities, mortgage debts, etc. (of which no notice was, during his life, given by him to the grantors of the annuities, or the mortgagors), in trust for himself for life with remainder to the plaintiff and with covenants for further assurance; and the bill, alleging that being without consideration it was doubtful whether the assignments were valid, charged that, if invalid, the property comprised in them ought to be administered as part of the personal estate of the testator. The court having desired to hear counsel for

Hunt *v.* White, 37 Law J. Ch. (N. S.) 326, S. C., 16 Weekly Rep. 478 (1868, per Malins, V. C.), one entitled to the benefit of a covenant for quiet enjoyment was not allowed to prove against the estate of his covenantor, because although that covenant was a general one, yet as the defect of title appeared in the recited deeds, it must, it was thought, be taken to be qualified and restrained by the other covenants in the deed; but as to this see *supra*, § 289 *et seq.*, and the decision is severely criticised in 45 Law Times, 157.

[1] "A question has been attempted to be made," said the Chancellor, "whether the plaintiff is entitled both to the annuity and to the legacy, but there can be no doubt. The only question is under the annuity deed; the lands charged with it, and of which he covenanted to be seised in fee and had power to dispose, prove to be not so, except three acres of land, which are very insufficient. The plaintiff therefore must have satisfaction of that covenant and will be a creditor by specialty *quoad hoc*."

[2] 14 Sim. 531 (1845), Shadwell, V. C.

[3] There had been a previous bill filed to enforce the trusts of the settlement (Ward *v.* Audland, 8 Beav. 201, see *infra*), which had been dismissed on the ground that the property had not legally vested in the complainants, but the case has been overruled on this ground, as has also Hervey *v.* Audland; see *infra*, p. 618. In the argument of the latter case, Williamson *v.* Codrington seems not to have been noticed in any way.

[4] 8 Hare, 310 (1850), Knight Bruce, V. C. The case is not well reported.

those who contended that the voluntary deeds did not bind the estate, the latter cited Ward *v.* Audland,[1] when the court said that the covenant for further assurance created a debt, and that if the testator died solvent the covenant must be performed; and counsel then suggesting that the court might give the party claiming the benefit of the covenant the opportunity of bringing an action,[2] the court, after quoting the covenants, said that "the Court of Chancery undertook to administer the estates of deceased persons, and it was the duty of the court to do so, if practicable, without sending parties to courts of law, for which there was no necessity in this case. He did not say the court would specifically perform the covenant, but all the covenantee required was damages, and those damages the Court of Chancery could in such a case estimate and give better than a court of law.[3] It was not necessary for him to decide, and he did not decide, whether without the covenant for further assurance this voluntary instrument would prevail; but the covenant being there, the court would fasten upon it and hold that the assignment operated to bind the estate."

So in the later case of Hales *v.* Cox,[4] a testator, in consideration of affection for the children of his first marriage, settled certain estates in trust for their use, covenanting for quiet enjoyment and further assurance, and subsequently conveyed the estates in mortgage with a power of sale, which was exercised by the mortgagees after his death, and the surplus, after paying the mortgage, was before the court for distribution, and the court held, "The persons who are entitled to the benefit of the covenants for quiet enjoyment contained in the settlement have a right to prove against the assets of the settlor for the amount to which they have been damaged by reason of his subsequently mortgaging the settled property; that is, after providing for the testator's debts, they are entitled to priority over the legatees." [5]

[1] 8 Beav. 201. A branch of Hervey *v.* Audland, *ubi supra*; also *infra*, p. 620.

[2] The same argument was used in Williamson *v.* Codrington, which case is referred to by the reporter in Cox *v.* Barnard.

[3] And yet this was said eight years before the passage of Lord Cairns' Act, *supra*, p. 603.

[4] 32 Beav. 118, Romilly, M. R.

[5] The report goes on to say that the court declared "these two principles: that the claimants under the voluntary settlement are entitled, as against the testator, his heirs and devisees, to marshal the securities; and they are also entitled as against the legatees to prove, under the covenant, against the assets."

§ 365. Subject of course to the application of local statutes or practice as to the administration or marshalling of assets, the same general doctrine of course applies on this side of the Atlantic. Thus in a case in Virginia,[1] land which had been conveyed with covenants for seisin and of warranty in trust to pay the grantor's note, of which the complainants were indorsers, was sold under a prior deed of trust made to secure a previous debt.[2] The grantor died, and the complainants, being forced to pay the note, filed a bill against his heirs, claiming to be subrogated to the rights of the indorsee and to charge the heirs to the extent of the assets descended to them for a breach of their ancestor's covenant, and a decree was made accordingly.[3] So in a case in Kentucky, it was considered that "the discovery of assets, the necessity of subjecting the real estate of the deceased warrantor and the non-residence of most of the heirs, form a sufficient foundation for the jurisdiction of a court of equity to give relief for a breach of the warranty."[4] So in Arkansas, it was correctly said that wherever the remedy was purely legal, and adequate in a court of law, a covenantee must seek it there and there alone; but that when a court of chancery had once obtained jurisdiction for some substantial purpose, it would retain it for all purposes so as to do complete justice between all the parties, and it was added, "It may be safely said that as a general rule in view of our system of administration, where the creditor is compelled to resort to the heir for payment of the debts of the ancestor, his remedy is in chancery rather than at law."[5] In short, whenever

[1] Haffey *v.* Birchetts, 11 Leigh, 83. See also Dickinson *v.* Hoomes, 8 Grat. (Va.) 353; *supra*, p. 515, note.

[2] Mortgages in Virginia generally are in the form of deeds of trust with powers of sale. *Infra*, p. 633, note.

[3] "It is said, however," said the court, "that the right of the parties to damages for breach of this covenant could only be asserted at law, and that a court of equity could not properly estimate them. As a general principle this is true, but here the plaintiffs, having no rights but by the equitable principle of substitution, could assert no remedy at law. They could only get relief in equity. Moreover, although it is generally true that damages should be inquired of by an issue at law, yet here that could not be necessary, since the damages were fixed and already certain. The damage was the value of the land lost, and that value was ascertained by what it sold for. The debt was paid out of a trust, subject to which the second incumbrancers had title, and the grantor could not complain, nor can his heirs complain at reimbursing the second incumbrancers to the full value of what had been paid for him to their prejudice. In this view of the matter an issue must have been superfluous."

[4] Kyle *v.* Fauntleroy, 9 B. Mon. 620. As it was then the practice in these reports to give only the opinion of the court, one is often at a loss for the facts of the cases.

[5] Higgins *v.* Johnson, 14 Ark. 309.

a court has jurisdiction of the distribution of a fund, it will consider the rights of those claiming under breach of covenant. "The objection," said the court in a case in New York, "that the covenant of quiet enjoyment cannot be enforced in this proceeding is not available, nor are the rules which would govern an action for the breach of such a covenant applicable where the controversy arises, as it does here, between the covenantor and covenantee as claimants in a court of equity of the same fund." [1]

§ 366. In these cases it will have been seen that the jurisdiction had attached for the purpose of administration of assets, and, according to the weight of authority, the fact that the covenants were contained in voluntary conveyances — in other words, the question of consideration — was not deemed to be material. But that question is considered to be very material in cases where the jurisdiction is sought to be based upon the grounds of specific performance, of contribution, or of exoneration.

§ 367. Thus, as to *specific performance*. In Jefferys *v.* Jefferys,[2] a father had, by voluntary settlement, *conveyed* certain freehold estates to trustees for the benefit of his daughters, and by the same instrument *covenanted to surrender* to the same trusts certain copyhold estates. Upon his death, on a bill to compel specific execution of the trusts, it was decreed that the settlement was valid as to the freeholds, but void as to the copyholds for want of consideration.

So in Ward *v.* Audland, the grantor, by a voluntary settlement containing a covenant for further assurance, *conveyed* his personal property to trustees, in trust for himself for life, with remainder to his wife and nieces. The grantor remained in possession of the property until his death, when the trustees filed a bill to establish the trusts of the settlement, but the Master of the Rolls held that as *the legal title* had not vested in the complainants, the covenant would not effectuate the assignment, and the bill was dismissed.[3]

[1] Clarkson *v.* Skidmore, 46 N. Y. 297. To the same effect are Johnson *v.* Wilson, 77 Mo. 639; McClaskey *v.* O'Brien, 16 W. Va. 791; Tracey *v.* Shumate, 22 id. 474.

[2] 1 Cr. & Ph. 138. This was one of the cases which had differed from Ellis *v.* Nimmo, Lloyd & Goold, 333, decided by Sugden while Chancellor of Ireland.

[3] 8 Beav. 201, per Langdale, M. R., see *supra*, p. 618. For the defendant it was argued: "We do not dispute that a voluntary covenant may be the subject of a demand in equity, but the question as

So in a case in New York, where a testator in consideration of natural affection made a conveyance to the plaintiffs, his grandchildren, covenanting that he was seised of a good and indefeasible estate of inheritance, free and clear of all incumbrance. It turned out that there was a mortgage on the land, and the plaintiffs brought suit against the executors to compel them to pay it off out of the assets of the estate, "being," the report says, "in the nature of a bill in equity for a specific performance of the covenants in the deed." On a reference, the report was in favor of the plaintiffs, but this was set aside by the court on the ground that although equity would sustain voluntary conveyances so far as they were executed, yet it would not enforce executory agreements or covenants. "We admit the validity of the deed as a conveyance," said the court, "but deny the obligation of the covenants which it contains." [1]

So where the bill is filed for *contribution or exoneration.* Thus in a case in the Irish Chancery, one seised of several estates, and indebted by judgment, settled one of them *for a valuable consideration*, with a covenant against incumbrances, and subsequently acknowledged other judgments, and it was held that the prior judgments must be thrown entirely upon the unsettled estates, and that the subsequent judgment creditors had no right to make the

to what extent a court of equity will give effect to it depends on the nature of the covenant and the frame of the suit. The frame of this suit is not for the administration of the assets, but for the recovery of the specific property, and the covenant is such that nominal damages would alone be recovered at law." And the court said: "It appears to me that neither a voluntary assignment, by deed, of a mortgage debt, accompanied by a grant, not specifying the particular estate but of all estates held in mortgage, and by a covenant for further assurance, without delivery of the mortgage deed or notice to the mortgagor, nor the voluntary assignment of a policy of assurance retained in the hands of the assignor, and without notice given to the grantor, though accompanied by a covenant for further assurance, can be considered as a complete and effectual assignment, to be acted upon and enforced by the assignee, without any further or other act to be done by the assignor." It must be observed of the cases of Jefferys *v.* Jefferys and Ward *v.* Audland, that while the decisions, so far as respects the subject of the covenants for title, are unquestionably sound, yet that they have been properly qualified upon another point, as it is now well settled in England that the mere absence of consideration will not, of itself, be a sufficient ground to deny relief, provided the transaction has taken the form of *a trust*, and the grantor has done all in his power to perfect it. Kekewich *v.* Manning, 1 De Gex, M. & G. 176. Notes to Ellison *v.* Ellison, 1 Lead. Cas. in Eq. where the cases are collected. But this does not apply to the ordinary case of a voluntary deed, nor to the covenants contained therein.

[1] Duvoll *v.* Wilson, 9 Barb. S. C. (N. Y.) 487.

settled estates contribute ;[1] and a similar decision has since been made in England.[2]

§ 368. In Stock *v.* Aylward,[3] however, one seised of an estate in fee subject to a charge in favor of another, *by a voluntary conveyance* reciting the charge though misstating its amount, settled the estate upon himself for life, remainder to his eldest son for life, remainder in strict settlement, and covenanted for further assurance ; the charge being subsequently paid during the lifetime of the settlor out of the rents and profits of his life estate, his judgment creditors, after his death, petitioned to compel the inheritance to refund the amount thus paid, but the court said that the effect of the covenant was to exonerate the estate from the payment of this debt, and the petition was refused.[4]

But this decision seems open to much question, and in a later case in the same court received so marked a qualification as almost to amount to its reversal. The owner of lands which were subject to a paramount incumbrance created by his ancestor, having *conveyed* one part thereof by a voluntary deed which contained a covenant for further assurance, and *devised* the remaining part, it was held that the covenant for further assurance did not exonerate the grantee from contributing to the payment of the paramount charge, though the court seemed to think that the decision

[1] Averall *v.* Wade, Lloyd & Goold, (temp. Sugd.) 252 ; *supra*, p. 502, n. 1. "Here is a covenant," said the Chancellor, "that the estate is free from incumbrances. Assuming that there was no such covenant, but a mere declaration that the estate was free from incumbrances, there can be no doubt that that declaration would throw the incumbrances on the unsettled estate. I cannot put the point on lower grounds, but I can put it on much higher. The covenant is enforced not by giving damages, because this court does not give damages [see *supra*, p. 603 *et seq.*], but according to the peculiar jurisdiction of this court, by specifically doing that which ought to be done."

[2] Hughes *v.* Williams, 3 Mac. & Gor. 683. The facts were almost identical with those in Averall *v.* Wade, and that decision was approved.

[3] 8 Irish Ch. R. 429, per Napier, C.

[4] "Now if, under a covenant for further assurance," said the Chancellor, "a purchaser may, as a matter of course, require the removal of a judgment or other incumbrance, it would seem to me that under this covenant the settlor would be bound to exonerate from his own debt, secured by the judgment, the estates of those taking in remainder under this settlement [Sugd. on Vend. (14th ed.) 613]. This judgment has been satisfied out of the rents and profits of his life estate ; and now it is sought, against his will and in violation of his covenant, to have the amount paid a second time out of the estate upon which it originally attached as a lien. If an action were brought on the covenant by reason of the proceeding against the inheritance, the answer at law would be, the judgment has been paid and satisfied by the settlor. Can the same facts supply the defence of the one party and the claims of the other ?"

would have been otherwise if the conveyance had contained a covenant against incumbrances.[1] And in referring to Stock *v.* Aylward, the court refused to extend the doctrine of that case to a deed without consideration.[2]

[1] Ker *v.* Ker, Irish R. 4 Eq. 15. "This was a voluntary deed," said the Chancellor, "and it contained no covenant save . . . for further assurance. . . . When that voluntary deed was executed, the lands conveyed by it were well charged in the hands of the grantor with the paramount incumbrances created by Alexander Ker. . . . It was clearly in the power of the grantor, Andrew Ker, to relieve the grantee from them; he might have made the gift free and absolute, and covenanted so as to take away the grantee's liability. But has he done so? I think not. By this voluntary instrument, he gives what he had, and nothing else; and what he had was Lisalea, onerated by the paramount incumbrances. Neither by his will nor by his codicil, on which reliance has been placed in the argument, does the effect of the deed in this respect appear to have been altered. . . . It might have been otherwise if Stopford had been a purchaser for value. It would certainly have been otherwise if he had obtained a covenant against incumbrances. In that case he would have been entitled to indemnity for contribution from the grantor or from his devisees, if the incumbrances, or any portion of them, had been levied from Lisalea. But, as the matter was, I think he could not. . . . The grantor would have been entitled to say, 'By my voluntary gift I placed you in my own position *quoad* the subject of it; but I did no more. I gave you the benefit subject to the burden, and, accepting the land, you became liable to the incumbrances.' We must take the deed as we find it; and, if the want of a covenant against them affects the grantee injuriously, this court cannot supply the defect, because of its voluntary character. Averall *v.* Wade [*supra*, p. 622, n. 1] was a case in which there was valuable consideration and a covenant against incumbrances, and this is observed upon in Handcock *v.* Handcock, 1 Irish Ch. 444."

[2] "In Stock *v.* Aylward, 8 Irish Ch. 429, it was assumed," continued the Chancellor, "that, 'under a covenant for further assurance, a purchaser may, as a matter of course, require the removal of a judgment or other incumbrance.' . . . The references in support of this opinion are to the two cases to which I have adverted. And looking at them, and considering that in King *v.* Jones, 5 Taunt. 420, there was not a voluntary deed, but a deed for value, which may or may not have contained a covenant against incumbrances, but, being for value, probably did contain such a covenant, and at all events imported a right to protection not implied in a voluntary conveyance, and seeing that upon that case the subsequent *dicta* have been founded, I think it is not too much to take them in connection with the special circumstances to which they had reference, and refuse to extend their operation to a deed without value. We are asked, in effect, to import into it a covenant against incumbrances, which may have been deliberately omitted by the grantor, and we cannot, as I have said already, exert the powers of this court to supply imperfections in a voluntary instrument."

So in the more recent case in the same court of *In re* Gardner, 11 Irish Ch. 519, a tenant for life, having power to charge the estate with a sum for his own benefit, conveyed the property subject to the charge, for a valuable consideration, to the remainderman, covenanting for quiet enjoyment. A judgment for a greater amount than the charge had been previously recovered against the tenant for life, and a receiver of the lands appointed; this judgment was subsequently purchased by the owner of the property, and upon a petition by the tenant for life to raise the charge out of the estate, it was held that the proceedings under the judgment were a breach of the covenant for quiet enjoyment, and that the covenant having bound the grantor to indemnify his grantee, the former could not assert a claim to the

So it has been held in Massachusetts, that where a tract of land is subject to a mortgage, and a part thereof is for valuable consideration conveyed with a covenant of warranty, the covenant exempts the grantee from the payment of any portion of the mortgage, provided the lands remaining in the hands of the grantor are of sufficient value to satisfy the charge; but if the remaining security is insufficient to discharge the incumbrance, then the premises are liable in the inverse order of their alienation,[1] and this familiar doctrine is everywhere enforced irrespective of the covenants for title.[2]

§ 369. And, next, as to *injunction.*

Although we have thus seen that the jurisdiction of equity in the specific performance of covenants for title is shown in a large class of cases, yet they yield in number to those in which the remedy is sought to be enforced by means of the writ of injunction. The cases are generally those in which the *covenantee* or those claiming under him comes into equity to restrain the collection of unpaid purchase money, but there are a few instances in which a somewhat similar jurisdiction has been successfully invoked at the suit of the *covenantor.*

Thus in an early case in England, "the defendant had drawn in the plaintiff, a young man, and purchased an estate of him at

charge while the judgment was unsatisfied and the receiver outstanding, and the petition was therefore refused.

So where, in another Irish case (Stack *v.* Royse, 12 Irish Ch. 246), a grantor in a marriage settlement seised of estates in fee and for life, settled his fee simple estates in trust for himself for life, remainder to the objects of his appointment, with remainder over, covenanting "to do any act or execute any conveyance, if required, of and concerning the specified lands or any other lands and premises of which he should at any time be possessed or entitled to, in order to more fully effectuate and carry out the true intent and meaning of the settlement," and afterwards exercised the power of appointment in favor of his son. Upon a judgment being subsequently obtained against the settlor, a receiver was appointed, during his lifetime, of both the fee simple and the freehold lands, and after his death a motion was made to continue the receiver; but it was held that the freehold, as well as the settled estates, became the subjects of the trust, and that the son took them discharged of the lien of the judgment.

[1] Chase *v.* Woodbury, 6 Cush. 143; Bradley *v.* George, 2 Allen, 393; George *v.* Wood, 11 id. 41; McClaskey *v.* O'Brien, 16 W. Va. 791. *Supra,* p. 502, n. 1.

[2] Guion *v.* Knapp, 6 Paige Ch. (N. Y.) 35; Cumming *v.* Cumming, 3 Kelly, (Ga.) 482; 2 Washb. on Real Property (5th ed.), 212; notes to Aldrich *v.* Cooper, 2 Lead. Cas. in Eq. In Cooper *v.* Bigly, 13 Mich. 475, it was held that as between grantor and grantee a covenant of warranty was only evidence of the intention not to charge the land sold with a proportionate part of a paramount mortgage, and that the absence of the covenant was no ground to hold that the intent could not be presumed. *Supra,* p. 502, n. 1.

a great undervalue; and it happened that the title was defective, and the defendant had been evicted; and there being covenants for quiet enjoyment and other securities entered into by the plaintiff, he now came to be relieved against an action brought on these covenants, and for the defendant Swaine it was insisted that he ought to have the value of the estate evicted;" but Lord Keeper North said, "The defendant, who was a lawyer, and ought to have understood a title, purchased this estate at a great undervalue, and the title now proving defective, and the land evicted, it is unreasonable he should make an advantage of this catching bargain; and therefore decreed him his purchase-money with interest only, discounting mesne profits." [1]

So in a case in Connecticut, the complainants had sold a large lot of ground in the city of Hartford, with covenants for the title. The purchaser had however, in addition to the covenants, required from the vendors security to save him harmless from a lien which the city claimed to have against the property for paving done in front of it some years before, and the vendors then filed a bill against the city, praying that it disclose the grounds of the claim and the amount of the lien, if it existed, and upon payment thereof release the premises therefrom; or, if invalid, that the city be enjoined from prosecuting it. Upon reference to a master he reported that the lien was invalid; whereupon it was urged on behalf of the city, that if the lien were void on its face equity would neither interfere to set it aside nor enjoin an attempt to enforce it; that the complainants had an adequate remedy at

[1] Zouch *v.* Swaine, 1 Vern. 320.

In Sanders *v.* Wagner, 32 N. J. Eq. 506, after an exchange of lands by deeds with full covenants, the executors of one party discovered that there was no title of record to the lands received by him (unseated lands in Pennsylvania), and that they had been sold for taxes, whereupon they bought in the tax title and sued on the covenants. The defendant in that action then sought to enjoin it, and proved that the taxes on both properties were, by agreement, excepted from the operation of the covenants, and that, at the time of the exchange, he had a valid title, which he had since put on record. On his payment of the cost of the tax title with interest, together with the costs in the former action, and the costs of the defendants in the injunction suit, the injunction was granted. In McKinney *v.* Watts, 3 Marsh. (Ky.) 268, a covenantor filed a bill for relief against a judgment obtained against him at law upon his covenants, and for the quieting of the title, which was sustained principally, it would seem, on the ground of the purchaser having received, on his eviction by the holder of the paramount title, allowance under the occupying claimant law for improvements, for which allowance the complainant had received no credit in the judgment recovered against him.

law for the contract price, to which, if the lien were invalid, there could be no defence; and that the plaintiffs, having sold and conveyed the property, had no longer any interest in it which equity could protect. But these objections were overruled by the court, and a decree entered for the complainants.[1]

So in a case in Georgia, the complainant, having sold land with a covenant of warranty, averred in his bill that the defendant was combining with a prior vendor of the land, whose deed had contained no covenants, to set up a claim by reason of the defective probate of that deed, had purchased the claim for a nominal consideration, and had brought an ejectment for the land in the name of the assignor, and prayed that the assignment of the claim might be declared fraudulent and be cancelled, or that the defendant be decreed a trustee for the purchaser, and quiet his title by conveying to him, and that the ejectment be enjoined. Upon demurrer, the court below dismissed the bill, but this was reversed

[1] Chipman *v.* City of Hartford, 21 Conn. 488. In answer to the first objection, the court distinguished the case from those which decided that where the mere object of the bill was the cancellation of an instrument void on its face, equity would not interfere. "This bill does not ask for the bare cancellation of a deed. The city of Hartford had instituted certain proceedings, which they claimed had resulted in fixing a lien upon the property of the plaintiffs. . . . Aside from any discovery sought, this bill is not merely *quia timet*, but the claim of the defendants is working a present injury by actually preventing purchasers from making payment of the stipulated price to the plaintiffs, by reason of the cloud upon their title. 2 Story's Eq. § 700. In Simpson *v.* Lord Howden, 3 Myl. & Cr. 99, an action at law was pending to try the same question; and in Peirsoll *v.* Elliott, 6 Pet. (S. C. U. S.) 98, the same question had been already determined; but here the plaintiffs were left in the dark and in doubt, because the defendants still insisted upon their lien, and yet instituted no means to enforce it. They have left the plaintiffs to the expense of determining their rights, only in this way, and by this bill; and now, not until the county court upon this hearing has decided that no such incumbrance exists, the defendants very ungraciously say, Yes, this is true, and so obviously true that the plaintiffs have never been in danger, and have had no just occasion to bring us into a court of equity. If the defendants had demurred to the bill at first, acknowledging their want of a lien, their defence would have appeared better." In answer to the objection that the plaintiffs had a remedy at law against their purchasers, it was said that apart from the ground that such an objection, being one to the jurisdiction, should have been made at an earlier stage, yet that it had no foundation in this case. "We are not aware of any case which decides that if the plaintiff has an equity against the defendant, a court of equity loses its jurisdiction because there may be a remedy at law at the election of the party against a stranger or some other person." And in answer to the objection that the plaintiffs, having conveyed the land, had no interest which equity could protect, it was said that although they did not own the land itself, still they had an essential interest in the question of the title by which the purchasers under them held the land, by reason of the covenants for title in their deeds. It was obvious that their interest was as direct as if they then held the land.

in the court above, where it was held that the complainant was entitled to the relief prayed for.[1]

So in a case in Illinois, a mortgagor of land having obtained a release of the mortgage from one of the mortgagees (which it was contended was binding on the other), conveyed the premises with covenants to a purchaser, against whom the other mortgagee commenced proceedings of foreclosure to which the vendor was not made a party, and the latter then filed a bill against the mortgagee, praying that he be enjoined from their further prosecution, and be decreed to satisfy the mortgage of record. It was objected that the complainant had a complete remedy at law by reason of his power to set up the release as a defence against any action brought on the covenants; but the court held that he was not obliged to postpone the assertion of his rights until that time, when perhaps his evidence might have passed beyond his reach. And the decree which had been entered below for the complainant was affirmed.[2]

[1] Redwine *v.* Brown, 10 Ga. 311. The argument on behalf of the defendant was chiefly directed to the point that the purchaser from the complainant could maintain no action on the covenants of any but his own immediate vendor, as to which, however, the law has long been well settled; see *supra*, § 214; and the court said in conclusion, "We are well satisfied that in case the present owner should lose this land, he would be entitled to go back upon the complainants, upon the covenant of warranty to Dominick, and that consequently he is *rectus in curia* as complainant in the bill, seeking to have the incumbrance on the title removed." In Bush *v.* Keller, 2 Cart. (Ind.), 69, a bill was filed by a vendor to prevent his vendee from suing on the covenants for title, or from setting them up by way of defence to payment of the purchase money, on the ground of mistake in the original preparation of the deed, which it was alleged was to be only a quit-claim deed, but in which a warranty had been inserted by mistake. The court below decreed for the complainant, but this was reversed on error, on the ground that the evidence had by no means substantiated the charge of mistake. In Taylor *v.* Gilman, 25 Verm. 411 (*infra*, p. 654, n. 4), the court sustained a bill filed by a covenantor to restrain his covenantee from suing on the covenants for title, not on the ground of accident or mistake in the insertion of the covenants themselves, but of fraud on the part of the latter in seeking to enforce them in opposition to a distinct agreement between the covenantor and himself, which, though denied in the answer, was sustained by proof. See *supra*, p. 113, n. 2. See as to the reformation in equity of the covenants for title, *infra*, § 383 *et seq.*

[2] Hubbard *v.* Jasinski, 46 Ill. 160. "Moreover," said the court, "this is a controversy between Jasinski [the mortgagor] and Hubbard [one of the mortgagees], and should be settled between them, instead of being litigated between Arneson [the purchaser] and Jasinski. Justice to Arneson requires this. If Jasinski has paid this mortgage in a manner to be binding upon Hubbard, the attempt of the latter to foreclose it is a wrong both to Jasinski and to Arneson, and the former, as the party ultimately liable upon his covenants to the latter, must be permitted to bring Hubbard before the court for the purpose of settling the question of payment, and having the mortgage fully cancelled upon the records in case it has been paid. Only

In a case in New Hampshire, while the court seemed to be of opinion, that although it might be doubtful whether one who had no other interest in land than his liability on his covenants could singly maintain a bill which sought to quiet the possession by an injunction merely, it yet held that where other relief was sought, and an account was to be stated between the covenantor and the defendant, the bill could be sustained.[1]

So in a case in Mississippi, the complainant having bought at sheriff's sale certain land which had been entered by the debtor at the land office, subsequently sold it with covenants for title to one against whom an ejectment was brought by parties claiming under patents from the government issued to them by virtue of alleged prior assignments to them by the debtor, and the complainant filed a bill against these parties for a discovery of the date of the alleged assignments, and for an injunction to restrain their further proceeding in their suits against his vendee. On demurrer, the bill was dismissed; but this was reversed on appeal, the court being of opinion that the complainant, being bound to protect the title of his vendee, could avail himself of any remedy open to the latter; that it being settled in that State that if the lands had been validly sold under execution before the patent had been issued the complainant had acquired a good title, he was entitled to discovery of the date of the alleged assignment, and, coming into equity for one purpose, could maintain his bill for complete relief.[2]

§ 370. But a court of equity will not draw to itself a jurisdiction of which courts of law have cognizance, unless there be some mistake, accident, or fraud which would deprive the party of a defence at law; and in a case in Wisconsin, a vendor who had sold land with covenants for title filed a bill against his vendee (who had sued him upon those covenants) and the heirs of a prior vendor of the land, alleging the loss of the deed from that vendor,

in this way can complete justice be done. If Hubbard had made Jasinski a party to the foreclosure suit, this controversy might have been settled there, and this suit would have been unnecessary." It is possible that the local practice in that State did not permit the mortgagor to apply to be made a party defendant in the foreclosure suit. Johnston *v.* Piper, 4 Minn. 195, and Browning *v.* Crisman, 30 Mo. 355, were cases in which it was held that a covenantor, by reason of his liability on his covenants, was properly joined or brought in as a defendant, relief being sought against other parties also.

[1] Brooks *v.* Fowle, 14 N. H. 248.

[2] Huntingdon *v.* Grantland, 33 Miss. 454.

and praying that the latter might be perpetually enjoined from setting up any title to the premises, that the purchaser be decreed to have no cause of action against the complainant by reason of the supposed defect of title, and that he be enjoined from prosecuting his suit at law. But the bill was dismissed, the court considering that in effect it was asked to decree a nonsuit in a suit at law; that there had been no fraud, accident, or mistake which would make it against conscience for the purchaser to maintain his action; that it was not asserted that the loss of the deed endangered the complainant's defence to that suit, and that proof of that loss could be as well supplied in a court of law as in equity.[1] And in New York it is considered that a party cannot maintain a suit to remove a cloud upon the title to land in which he has no interest, and upon the sole ground that he is liable on his covenants.[2]

§ 371. Nor, according to the present apparent weight of authority, as has been already seen, will equity deprive a covenantee of his right to damages for a breach of the covenants, by compelling him, at the suit of his covenantor, to accept a title subsequently acquired by the latter;[3] while, at the same time, after such damages shall have been so recovered, the covenantee will be restrained from setting up, as against his covenantor, that title which, by his action on the covenant, he had asserted to be defective; and in such cases a reconveyance would probably be decreed.[4]

§ 372. The remedy in equity by the process of injunction is perhaps most frequently invoked by an owner of land to restrain the collection of unpaid purchase money or to rescind the contract, and as may be imagined, the books swarm with cases on the subject. The result may be thus stated in a word: so far as the case rests on contract, and apart from all question of fraud, unless the purchaser has a present right to damages upon his

[1] Rogers *v.* Cross, 3 Chand. (Wis.) 34.

[2] Bissell *v.* Kellogg, 60 Barb. (N.Y.) 617; Townsend *v.* Goelet, 11 Abb. Pr. R. 187; Phillips *v.* Mayor of New York, 2 Hun, 215.

[3] *Supra*, §§ 179, 258. Neither will a covenantee be forced to rescind the contract against his will. In Trevins *v.* Cantee, 61 Tex. 88, there had been a conveyance with covenant of warranty, and an agreement that in case of a failure of title, the damages should not exceed two thousand dollars. The covenantor alleged failure of title, and petitioned for a release from his covenants, and a reconveyance on payment of this sum. The court held that the failure of title was not proved, but that in any event the plaintiff could not compel a reconveyance.

[4] *Supra*, § 185.

covenants, relief, in the absence of the insolvency or non-residence of the vendor, is in general refused.

The leading cases are the two early ones in New York of Bumpus *v.* Platner and Abbott *v.* Allen. In the first of them, decided in 1814,[1] where the bill prayed an injunction to restrain proceedings on a mortgage given for the purchase money, on the ground that the title had been previously conveyed to another, all of whose estate had become forfeited to the Commonwealth, Chancellor Kent, admitting that it was difficult to extract from the books what was the rule of equity on this point of failure of consideration, still apprehended that it might be safely said that there was no case for relief where possession had passed and continued without any eviction at law under a paramount title. He considered an eviction at law an indispensable part of the plaintiffs' claim to relief.[2] The defendant conveyed to the plaintiffs with covenant of warranty, and he was bound to defend their title, and *non constat* that he was not able and willing to do it. If the title failed, the plaintiffs could resort to the covenants in their deed for their indemnity. Hence it was said to be without precedent, and dangerous in principle, to arrest the collection of the purchase money on the mere allegation of a failure of title, without more.

In Abbott *v.* Allen,[3] whose features were substantially similar, a doubt having been cast in the argument over the correctness of this decision, the Chancellor, on reviewing it, was satisfied of its soundness. "It would," he said, "lead to the greatest inconvenience, and perhaps abuse, if a purchaser in the actual enjoyment of land, and when no third person asserts or takes any measures to assert a hostile claim, can be permitted, on suggestion of a defect or failure of title, and on the principle of *quia timet*, to stop the payment of the purchase money and of all proceedings at law to recover it. Can this court proceed to try the validity of the outstanding claim in the absence of the party in whom it is supposed to reside, or must he be brought into court against his will, to assert or renounce a title which he never asserted, and perhaps never thought of? The only plausible argument for the injunction is, that as the plaintiff has covenants to secure his

[1] 1 Johns. Ch. 213.

[2] This, however, has been since modified so far as eviction at law means eviction by legal process. See *supra*, § 132 *et seq.*

[3] 2 Johns. Ch. 519, decided in 1817.

title, the interference of this court is necessary to prevent circuity of action, and that the plaintiff ought not to be compelled to pay the purchase money, when by a suit on his covenants he might, almost concurrently, be enabled to recover it back again. This argument would apply to every case of mutual and independent covenants, and would prove too much; but the proper answer here is, that to sustain the injunction would be assuming the fact of a failure of title before eviction, or trial at law, and which this court, as not possessing any direct jurisdiction over legal titles, is not bound or authorized to assume. This court may perhaps try title to land when it arises incidentally; but it is understood not to be within its province when the case depends on a simple legal title, and is brought up directly by the bill. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference." The question that might be presented, if there had been a previous eviction, or an existing incumbrance which appeared to admit of no dispute, was here left undecided. It would be hazardous, it was said, to define the limits of equitable relief in supposable cases of the like kind.[1]

§ 373. Within a few weeks, however, of this decision, the case of Johnson *v.* Gere[2] was presented before the same court, upon an *ex parte* application for an injunction to restrain proceedings on a mortgage given for the purchase money of land which had been conveyed with covenants for title, on the ground of an ejectment having been brought to recover the possession, and the bill prayed for a preliminary injunction until answer and the further order of the court. "The Chancellor granted the injunction, and distinguished this case from those wherein there was only an allegation of an outstanding title and no disturbance, prosecution, or eviction thereon. Here the party was actually prosecuted by an

[1] It may however be observed that when a question of title is presented, whose determination is incidental and necessary to the relief prayed, equity will not deny that relief merely because the question of title is involved. Such questions must be necessarily determined in nearly every case of specific performance, and come clearly within the concurrent jurisdiction of equity. It is, moreover, impossible in practice for a court to refuse to examine the adverse title in cases where the purchaser has a present right to actual damages, and the relief is based solely on the ground of preventing circuity of action. For in such cases it must determine that the right to damages exists, and it is by no means usual that it is relieved as to this by the previous judgment of a common law court.

[2] 2 Johns. Ch. 546.

action of ejectment, on the ground that the title derived from the defendant was defective. The defendant is entitled and it will be his duty to defend the ejectment suit, and until that suit is disposed of, he ought not to recover the remaining moneys due on the bond."

§ 374. This decision, however, is not now regarded as a precedent,[1] although occasionally cited with approbation,[2] and while it has at times been intimated that equity will not relieve unless there has been an eviction, "or a suit actually commenced to recover the land," [3] yet in none of those cases did that circumstance occur, and the general course of decision in New York has not only repudiated the doctrine of Johnson *v.* Gere,[4] but has re-

[1] Chancellor Kent, who had himself granted the injunction in Johnson *v.* Gere, (which, however, was only preliminary, and according to the practice at that day it was almost of course to dissolve the injunction on the coming in of the answer denying the bill,) takes no notice of the case in his Commentaries (2 Comm. 472), while he quotes with approbation the case of Abbott *v.* Allen, and those which have followed it.

[2] Thus in the early case in New Jersey of Shannon *v.* Marselis, Saxton, 413, all the parties to the title were before the court, and there could therefore be with propriety an equitable settlement of mutual claims, and the case did not need the authority of Johnson *v.* Gere, and the same remark applies to the cases of Van Riper *v.* Williams, 1 Green Ch. (N. J.) 407; Van Waggoner *v.* McEwen, id. 412; and Jaques *v.* Esler, 3 id. 462. But in the later case of Glenn *v.* Whipple, 1 Beasley Ch. (N. J.) 50, it was held that it was no defence to a foreclosure suit on a mortgage for purchase money that the grantor's wife had not joined in the deed and was now claiming dower, and the Chancellor said that Johnson *v.* Gere did not carry the doctrine to this extent. And although it is said to be a general rule that before a vendor is entitled to a decree of foreclosure on a purchase-money mortgage, he must pay off or otherwise get rid of any prior incumbrance covered by the covenants for title (Dayton *v.* Dusenbury, 25 N. J. Eq. 110; Union Bank *v.* Pinner, id. 495; Stiger *v.* Bacon, 29 id. 442), yet apart from this, the later cases are in accord with the general current of authority. Heile *v.* Davison, 5 C. E. Green Ch. (N. J.) 228; Hulfish *v.* O'Brien, id. 230; Cooper *v.* Bloodgood, 32 N. J. Eq. 209. In White *v.* Stretch, 22 id. 76, there was an express contemporaneous agreement to pay off a certain assessment if decided to be valid, which it afterwards was. In Sanders *v.* Wagner, 32 id. 506, the bill was sustained on the ground of mistake.

[3] Leggett *v.* McCarty, 3 Edwards Ch. (N. Y.) 126; Edwards *v.* Bodine, 26 Wend. (N. Y.) 114.

[4] The authority of Johnson *v.* Gere was denied in Platt *v.* Gilchrist, 3 Sandf. S. C. (N. Y.) 118, and also in Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 594, where Chancellor Walworth said, "I think it evident that the reporter was under a mistake in the statement of the case, or that the Chancellor overlooked the fact that it was not alleged in the bill that the complainants ever believed their title to the land was defective. For it cannot be possible that he intended to decide that a mere claim of a paramount title by a third person, and the bringing of a suit upon that claim against the purchaser, was sufficient to authorize the court to stay the vendor, who had warranted the title, from proceeding at law or in equity to collect the unpaid purchase money. If the law was so, any vendee who was not ready to pay his purchase money when it became due, might make a secret arrangement

strained the application of the *quia timet* jurisdiction of equity in this connection within such narrow limits as almost to amount to its denial. Thus where, on a bill to foreclose a mortgage given for the purchase money of land conveyed with warranty, the answer alleged that a suit had been brought by persons claiming the premises by paramount title, and prayed that the foreclosure and sale might be deferred until this should have been determined, it was held that although after eviction relief would be extended in order to prevent circuity of action, yet until that event the court had no authority to interfere.[1] "The purchaser in this case

with some third person to claim the premises and bring an ejectment suit therefor, and thus tie up the vendor from collecting his debt indefinitely. For, if the vendor should be allowed by the court at law to interfere with the defence of the ejectment suit so as to get it out of court in a reasonable time, the plaintiff might submit to a nonsuit and then bring a new action. And such new action, either by the original plaintiff or by a new claimant, would entitle the vendee to a new decree, staying the collection of the purchase money until the final termination of that suit."

[1] Platt *v.* Gilchrist, 3 Sandf. S. C. 118.

In Virginia, the practice was introduced at an early period, for the purpose of enabling a mortgagee to obtain payment without the delay and expense of a bill of foreclosure, of conveying the lands to a trustee, in trust to sell upon non-payment at the appointed time, and under such deeds of trust courts of equity in that State were liberal in enjoining sales where defects of title, covered by the covenants, could be shown to exist. Thus in Gay *v.* Hancock, 1 Rand. 72, where the purchaser proved an outstanding claim embraced within the covenants, and a suit then actually pending under it, the court of appeals held that the sale should be enjoined until the cloud resting on the title in consequence of the claim should be removed. This decision was approved and followed in subsequent cases; Ralston *v.* Miller, 3 id. 49; Miller *v.* Argyle, 5 Leigh, 467; Koger *v.* Kane, id. 606; Long *v.* Israel, 9 id. 569; and it was admitted that the court had, in favor of purchasers, gone far beyond anything which had been sanctioned in England or elsewhere in enjoining the payment of the purchase money, after the purchaser had taken possession under a conveyance, especially with general warranty; but it was said that it had never gone so far as to interfere, unless the title were questioned by a suit, either prosecuted or threatened, or unless the purchaser could show clearly that the title was defective. Ralston *v.* Miller, *supra*. In Miller *v.* Argyle it was said that a distinction had always been strongly drawn between an injunction under a deed of trust, and in the case of a judgment at law, "for it never can be equitable to permit a sacrifice by sale under a doubtful title, though it may be but just that the vendor should be suffered to enforce a judgment for his purchase money, when the vendee is in possession, since the doubt about the title may eventually turn out to be frivolous and groundless." In Beale *v.* Seiveley, 8 Leigh, 675, the court, after referring to the cases of Abbott *v.* Allen, etc., *supra*, p. 630, said: "With us it cannot be denied that the practice has been more lax. But even with us, relief is only given to a purchaser who has obtained his deed where there has been an actual eviction, or where a suit is depending or threatened, or where the vendee, placing himself in the attitude of the superior claimant, can show a clear outstanding title or encumbrance. A still greater liberality has prevailed, it is true, in enjoining proceedings under deeds of trust, but this rests upon peculiar principles." This distinction, however, seems not to have been always sharply observed, and the practice sanctioned with

promised to pay the purchase money at stipulated periods, and the seller covenanted that if at any time the title should fail, and the purchaser be evicted by a paramount title, he would refund the purchase money with interest. The possibility that the title might fail, and the purchaser be evicted, was in the minds of the parties. They might also have provided that in case of a claim being made by title paramount before actual payment of the consideration money, the right of the vendor to call for its payment should be suspended. But this they have not thought proper to do, and this court can with no more propriety add such a clause to the contract and suspend the collection of the purchase money, than it can suspend the collection of rent expressly covenanted to be paid, upon the destruction of the buildings, where the parties have not themselves provided against it." [1] So where a cross-bill in a foreclosure suit averred that one claiming under a paramount title had brought ejectment for a portion of the land, of which fact the plaintiff had been notified, and prayed that the foreclosure be enjoined until the plaintiff had settled or arranged the incumbrance of this paramount title, and that the amount necessary to buy in this claim be deducted from the mortgage debt, the cross-bill was dismissed.[2]

respect to deeds of trust seems to have crept into all securities given for purchase money. Yancey *v.* Lewis, 4 Hen. & Munf. 390 ; Long *v.* Israel, 9 Leigh, 569 ; Clarke *v.* Hardgrove, 7 Grat. 399 ; Renick *v.* Remick, 5 W. Va. 291. In Price *v.* Ayres, 10 Grat. 575, there were no covenants for title as to one purchaser, and no assertion of the paramount title as to the other, and relief was therefore denied to both of them. In the late case of Wamsley *v.* Stalnaker, 24 W. Va. 214, where is an elaborate opinion, the court seemed to consider that the doctrine held elsewhere was the better law, but deemed itself bound by the previous course of decision in Virginia and West Virginia.

[1] Platt *v.* Gilchrist, *supra.* "The court, moreover," continued Mason, J., who delivered the opinion, "if it interfere at all, must do so upon the simple fact of the claim having been made by suit, without reference at all to the character of the claim. . . . It is easy to see how dangerous the adoption of such a principle would be ; what a temptation it would hold out to the bringing of actions by collusion in order to stay foreclosures, and how greatly it would affect the value of mortgage securities of this character. . . . This decision may operate severely on the defendant in this case, and especially if the adverse claim shall turn out to be well founded ; but the contrary decision would operate with severity on the plaintiff, if the title shall prove good. He is, moreover, only pursuing his legal remedy for a debt admitted to be due, while the defendant has all the protection for which she stipulated in the event of the title proving defective."

[2] Magee *v.* McMillan, 30 Ala. 420. The court said, "We think the doctrine must be regarded as settled in this State, that where a sale of land is made by deed, with covenants of warranty, and the vendee has gone into possession under the contract, and he and those claiming under him have not been evicted, no defence, either at law or in equity, which rests on a mere incumbrance upon the title, can be

So where a will giving the executor power to lease was carelessly recorded so that the word "transfer" was substituted for "lease," and under this apparent power the executor sold to the plaintiff with covenants, taking a deed of trust to secure part of the purchase money, an injunction against a sale under the trust deed was refused.[1]

So where a vendor conveyed with covenants for seisin, against incumbrances, for quiet enjoyment, and of general warranty, and received from his grantee a note for the unpaid purchase money, to secure which the latter conveyed the land to another in trust to sell if payment were not made at maturity, at which time, however, payment was refused, on the ground that part of the property was in the adverse possession of others, and that suits were pending to recover other parts, and the trustee notwithstanding, at the request of the grantor, sold the tract for a sum less than the amount of the note. The grantee then filed a bill to set aside the trustee's sale and to restrain the grantor from collecting the unpaid purchase money, which was decreed by the court below; but this was reversed on appeal, and while the sale under the deed of trust was set aside owing to certain misrepresentations of the trustee and the grantor, yet it was held that the complainant had no equity to restrain the collection of the purchase money, having averred no fraud in the original sale, and was therefore remitted to his action upon the covenants; and although it was in proof that the grantor was insolvent, yet as that fact was not averred in the bill the evidence was disregarded.[2] So in a very recent case in Indiana,[3] in a suit to foreclose a purchase-

made, unless there was fraud in the sale, or the vendor is insolvent, or unable to make good the covenants in his deed," citing Cullum *v.* Branch Bank, 4 Ala. 21 (*supra*, p. 566, n. 1); Parks *v.* Brooks, 16 id. 529; McLemore *v.* Mabson, 20 id. 137; Patton *v.* England, 15 id. 69.

[1] Lovingston *v.* Short, 77 Ill. 587. The court said, "The complainant entered into possession of the premises under the contract of purchase, and that possessory right has never been disturbed, and from aught that appears never may be. No one claims or has asserted paramount title. There is no suggestion that the warranty is not good in case the complainant should ever be disturbed in the possession of the property."

[2] Hoppes *v.* Cheek, 21 Ark. 585. As to the necessity of averring insolvency, see Wimberg *v.* Schwegeman, *infra*, pp. 644, 645.

[3] Wimberg *v.* Schwegeman, 97 Ind. 525, *infra*, p. 645, n. 2. The court said, per Elliott, C. J.: "Our cases have steadily maintained that where a deed is received and possession taken under it, payment of purchase money cannot be defeated without showing an eviction or surrender of possession. Reasoner *v.* Edmundson, 5 Ind. 393; Small *v.* Reeves, 14 id. 163; Hacker *v.* Blake, 17 id. 97;

money mortgage, the defendant's counter claim alleged that the land was conveyed by a deed with full covenants, that the latter were broken because the grantor was not lawfully seised and had no right to convey two thirds of the land, and had only a life estate in the other one third, and did not or could not convey any greater estate, and prayed for an injunction to restrain the collection of the purchase money, but the court held that the defendant had not brought himself within any of the grounds upon which equity interfered under such circumstances.

§ 375. The cases might be multiplied almost indefinitely, and apart from the question of fraud, and of the incidental elements of the vendor's non-residence or insolvency, the doctrine they establish is that where the only covenants in the deed are those for quiet enjoyment or of warranty,[1] and so long as there has been no eviction, actual or constructive, equity will, as a general rule, refuse to enjoin the collection of the purchase money.[2]

Marvin *v.* Applegate, 18 id. 425 ; Estep *v.* Estep, 23 id. 114 ; Hanna *v.* Shields, 34 id. 84 ; Black *v.* Coan, 48 id. 385 ; Mahoney *v.* Robbins, 49 id. 146 ; Jones *v.* Noe, 71 id. 368 ; Gibson *v.* Richart, 83 id. 313. It is true that the breach of the covenant gave a right to nominal damages, but there are very many cases holding that a judgment cannot be reversed for a failure to award nominal damages. This is expressly held in many of the cases cited, and is impliedly decided in all of them, as well as in Platter *v.* City of Seymour, 86 Ind. 323 ; Axtel *v.* Chase, 77 id. 74 ; Town of Tipton *v.* Jones, 77 id. 307 ; Atkins *v.* Van Buren School Township, 77 id. 447 ; Patton *v.* Hamilton, 12 id. 256."

[1] See *infra*, § 378, for cases where there are also covenants for seisin, etc.

[2] Busby *v.* Treadwell, 24 Ark. 457 ; Barkhamsted *v.* Case, 5 Conn. 528 ; Lovingston *v.* Short, 77 Ill. 587 ; Harding *v.* Commercial Loan Co., 84 id. 251. (In Smith *v.* Newton, 38 Ill. 230, and Weaver *v.* Wilson, 48 id. 128, it expressly appeared in the mortgage and note sued upon, that the purchase money was not to be paid unless the titles were perfect.) Rawlins *v.* Timberlake, 6 Mon. (Ky.) 225 ; Simpson *v.* Hawkins, 1 Dana, (Ky.) 303 ; Trumbo *v.* Lockridge, 4 Bush, (Ky.) 416 ; English *v.* Thomasson, 82 Ky. 281 (where it was said, "It has been repeatedly held by this court that in the absence of fraud or insolvency or non-residence of the vendor, a vendee in the peaceable possession of the granted premises by virtue of a conveyance containing a covenant of general warranty is not entitled to a rescission of the contract when sued for the purchase money, although the vendor may, at the time of the sale, have represented his title as perfect, when in fact it was not ; and that in such a case the vendee must pay the money, and rely upon the covenant of warranty in case of an eviction," citing Miller *v.* Long, 3 A. K. Marsh. (Ky.) 334 ; Gale *v.* Conn, 3 J. J. Marsh. (Ky.) 538 ; Campbell *v.* Whittingham, 5 id. 96 ; Simpson *v.* Hawkins, 3 Dana, (Ky.) 303 ; Taylor *v.* Lyon, 2 id. 276 ; Duvall *v.* Parker, 2 Duvall, (Ky.) 182 ; Trumbo *v.* Lockridge, 4 Bush, (Ky.) 415 ; Upshaw *v.* Debow, 7 Bush, (Ky.) 442). Anderson *v.* Lincoln, 5 How. (Miss.) 279 ; Coleman *v.* Rowe, id. 460 ; Vick *v.* Percy, 7 Sm. & Marsh. (Miss.) 256 ; Walker *v.* Gilbert, id. 456 ; McDonald *v.* Green, 9 id. 138 ; Green *v.* McDonald, 13 id. 445 ; Johnson *v.* Jones, id. 580 ; Latham *v.* Morgan, 1 Sm. & Marsh. Ch. (Miss.)

§ 376. Nor, *a fortiori*, in such cases will a court of equity rescind the contract.

Thus in a case in the Supreme Court of the United States, where land had been conveyed with a covenant of general warranty, the purchaser alleged as a defence to a suit to foreclose a purchase-money mortgage, that at the time of the conveyance the land was in the adverse possession of others; but it being proved that this adverse possession was tortious, the court held that as there had been no breach of the covenant,[1] no ground existed upon which to rescind the contract;[2] and this doctrine is supported by the entire weight of authority.[3]

611; Gartman *v.* Jones, 24 Miss. 234; Wailes *v.* Cooper, id. 208; Mitchell *v.* McMullen, 59 Mo. 252; Key *v.* Jennings, 66 id. 356 (where the court pertinently said, "It is a dangerous and delicate operation for a court to pass upon a title which nobody is asserting and no one disputing"); Hile *v.* Davison, 5 C. E. Green, (N. J.) 228; Cooper *v.* Bloodgood, 32 N. J. Eq. 209 (and see the reporter's note to the case); Bates *v.* Delavan, 5 Paige, (N. Y.) 299; Hoag *v.* Rathbun, 1 Clarke Ch. (N. Y.) 12; Griffith *v.* Kempshall, id. 571; Denston *v.* Morris, 2 Edw. Ch. (N. Y.) 37; Leggett *v.* McCarty, 3 id. 124; Withers *v.* Morrell, id. 560; Edwards *v.* Bodine, 26 Wend. (N. Y.) 109; Woodruff *v.* Bunce, 9 Paige, (N. Y.) 443; Banks *v.* Walker, 2 Sandf. Ch. (N. Y.) 344; Miller *v.* Avery, 2 Barb. Ch. (N. Y.) 594; Tone *v.* Brace, 1 Clarke Ch. (N. Y.) 291; s. c. id. 503; 8 Paige, 582; 11 id. 569; Clanton *v.* Burges, 2 Dev. Eq. (N. C.) 13; Merritt *v.* Hunt, 4 Ired. Eq. (N. C.) 406; Wilkins *v.* Hogue, 2 Jones Eq. (N. C.) 479; Henry *v.* Elliott, 6 id. 175; Edwards *v.* Morris, 1 Ohio, 524; Stone *v.* Buckner, 12 id. 73; Elliott *v.* Thompson, 4 Humph. (Tenn.) 99; Young *v.* Butler, 1 Head, (Tenn.) 640; Beale *v.* Seivcley, 8 Leigh, (Va.) 658 (and see the Virginia cases *supra*, p. 633, note); Wamsley *v.* Stalnaker, 24 W. Va. 214.

[1] It will of course be borne in mind that to constitute a breach, the adverse possession must be under paramount title. See *supra*, § 137.

[2] Noonan *v.* Lee, 2 Black, (S. C. U. S.) 499. "It is not claimed," said the court, "that there was any fraud or misrepresentation, or that any fact exists in regard to the title which was unknown to the grantee when he bought the property. . . . It is impossible to read the testimony and resist the conclusion that he bought the property for a purpose, and that having held the title for several years without paying anything, and accomplished that purpose, he is now seeking, under the pretence of defect of title, finally to avoid the payment of the purchase money, and throw back the property upon the hands of the vendor. This ungracious work a court of equity will not permit him to do."

[3] Beck *v.* Simmons, 7 Ala. 76; Burkett *v.* Munford, 70 Ala. 423 (where the court said, "When a contract of purchase is free from fraud, we know of no authority — there is none certainly in the decisions of this court — which will justify a court of equity in interposing, at the instance of the vendee, to rescind the contract, because of the vendor's want of title, or because the title is defective, while he retains possession of the land, taking the benefit of the contract, unless it is clearly shown that injury must result to him from the abandonment of the possession"); Lovington *v.* Short, 77 id. 587; Roberts *v.* Woolbright, 1 Ga. Decis. 98; M'Gehee *v.* Jones, 10 Ga. 135; Beebe *v.* Swartwout, 3 Gilm. (Ill.) 162; Ohling *v.* Luitjens, 32 Ill. 23; Miller *v.* Long, 3 Marsh. (Ky.) 334; Perciful *v.* Hurd, 5 J. J. Marsh. (Ky.) 670; Lewis *v.* Morton, 5 Mon. (Ky.) 1; Vance *v.* House, 5 B. Mon. (Ky.) 537; Casey *v.* Lucas, 2 Bush, (Ky.) 55. (In Eng-

§ 377. The same rules are of course applied when a breach of covenant is set up as a defence to a suit in equity to foreclose a purchase-money mortgage or to enforce a vendor's lien. Thus in a foreclosure suit in New Jersey, the answer averred that the grant and covenants were for riparian property, and therefore covered the land between high and low water mark, but that the covenantee had been obliged to take a lease from the State of this part of the land, and this he claimed to be an eviction. The court held that even if the covenants were to be considered as assuring the title between high and low water mark, which was doubtful, there was no defence, for there had been no actual eviction, as the defendant "simply chose rather to acquire the right of the State to the land by obtaining a lease, than to obtain it by appropriation." [1]

§ 378. It has at times been considered that the presence of a covenant for seisin may in some cases fortify the position of a purchaser,[2] but it does not appear that the cases generally draw

lish *v.* Thomasson, 82 Ky. 281, it was stated to be clear that equity would not rescind an executed contract for the sale of land if the purchaser were still in possession, nor unless there had been fraud, or the vendor was insolvent; as to which see *infra*, § 380.) Middlekauff *v.* Barrick, 4 Gill, (Md.) 290; Haldane *v.* Sweet, 55 Mich. 196; Wilty *v.* Hightower, 6 Sm. & Marsh. (Miss.) 345; McDonald *v.* Green, 9 id. 138; Green *v.* McDonald, 13 id. 445; Cooley *v.* Rankin, 11 Mo. 647; Eddington *v.* Nix, 49 id. 134; Beach *v.* Waddell, 4 Halst. Ch. (N. J.) 299; Leggett *v.* McCarty, 3 Edw. Ch. (N. Y.) 124; Woodruff *v.* Bunce, 9 Paige, (N. Y.) 443; Whitworth *v.* Stuckey, 1 Rich. Eq. (S. C.) 404 (see the able remarks of Harper, Ch., in that case); Van Lew *v.* Parr, 2 id. 321; Maner *v.* Washington, 3 Strobh. Eq. (S. C.) 171; Buchanan *v.* Alwell, 8 Humph. (Tenn.) 518; Young *v.* Butler, 1 Head, (Tenn.) 648; Cohen *v.* Woollard, 2 Tenn. Ch. 686; Jones *v.* Fulghum, 3 id. 193; Long *v.* Israel, 9 Leigh, (Va.) 556; Young *v.* McClung, 6 Grat. (Va.) 336; Prevost *v.* Gratz, 3 Wash. (C. C. U. S.) 439; Greenleaf *v.* Queen, 1 Pet. (S. C. U. S.) 138; Patterson *v.* Taylor, 7 How. (S. C. U. S.) 132; Kimball *v.* West, 15 Wall. (S. C. U. S.) 377; Smoot *v.* Coffin, 4 Mack. (D. C. U. S.) 407.

[1] Cooper *v.* Bloodgood, 32 N. J. Eq. 209. To the same effect are Hughes *v.* Hatchett, 55 Ala. 539; Strong *v.* Waddell, 56 id. 471; Wyatt *v.* Garlington, id. 576; Hall *v.* Priest, 6 Bush, (Ky.) 14; English *v.* Thomasson, 82 Ky. 281; Smith *v.* Fiting, 37 Mich. 148; Haldane *v.* Sweet, 55 id. 196; Miller *v.* Owen, Walk. (Miss.) 244; Harris *v.* Ransom, 24 Miss. 504; Wofford *v.* Ashcraft, 47 id. 641; Glenn *v.* Whipple, 1 Beas. Ch. (N. J.) 50; Hughes *v.* McNider, 90 N. C. 248; Hulfish *v.* O'Brien, 5 C. E. Green, (N. J.) 230; Butcher *v.* Peterson, 26 W. Va. 447; Ludlow *v.* Gilman, 18 Wis. 552; Peters *v.* Bowman, 98 U. S. 56; Riswick *v.* Wallach, 3 McAr. (D. C. U. S.) 388.

[2] Long *v.* Israel, 9 Leigh, (Va.) 569; Simpson *v.* Hawkins, 1 Dana, (Ky.) 305; Ward *v.* Grayson, 9 id. 267. Thus in Ingram *v.* Morgan, 4 Humph. (Tenn.) 66, the court seemed to be of opinion that but for the covenant of seisin the vendor would have been without relief, as it was said, "This [covenant] differs from a covenant of warranty where there is no present right of action, and can never be till

much distinction between the different covenants for title.[1] For it frequently happens that a purchaser accepts his deed with full knowledge of the defect or incumbrance, and with the intention of relying upon the covenants for his protection.[2] In such case, to enjoin the collection of the purchase money because of the presence of a covenant for seisin or against incumbrances, would be to make for the parties a contract they did not make for themselves, and it would seem to be a proper rule that the interference of equity should be refused wherever the purchaser's knowledge and the state of facts continue to be the same as they were at the time of the conveyance.[3] In many of the cases upon this subject the fact of this knowledge on the part of the purchaser was strongly relied on by the court as a ground for refusing relief; and although it is well settled that such knowledge is of itself no bar to his recovery upon the covenants themselves in a court of law,[4] yet it is obvious that it should operate strongly, if not conclusively, against his right to equitable relief where they are not yet so broken as to give a present right to actual damages, and such has been the ground taken in several cases decided since these remarks were first written.[5]

eviction, which may never take place; and where, therefore, a court of chancery will grant no relief against the payment of the consideration, on the joint ground of a defect of title and the insolvency of the vendor." And in the later case of Baird *v.* Goodrich, 5 Heisk. (Tenn.) 20, the same court said: "The covenant of seisin, if it be false, is broken the instant it is made, and the right of action accrues at once to the covenantee. It is unlike the covenant of warranty, which if untrue, the covenantee must await an eviction before he can bring his action. And at law this is so, upon a mere failure of title, at whatever hazard of ultimate loss. . . . But a court of equity will not entertain a bill to rescind upon a mere breach of the covenant of seisin, without more. There must be either an allegation of fraud or the insolvency of the vendor, or, in the language of this court, 'some other distinct ground of equitable jurisdiction.'" In Woods *v.* North, 6 Humph. (Tenn.) 309, cited in this decision, the case seemed to have rested on the ground that a covenant for seisin which an administrator had given was such a *representation* as amounted to fraud, and the contract was rescinded on the ground of misrepresentation, but it is believed that there is no well-considered class of cases which give such an interpretation to a covenant, although a remark of Sugden heretofore cited (*supra*, p. 547, n. 1) might be taken as a possible authority.

[1] Beach *v.* Waddell, 4 Halst. Ch. (N. J.) 308; Young *v.* Butler, 1 Head, (Tenn.) 646. See also Woods *v.* North, 6 id. 309, *infra*.

[2] See *supra*, § 89 *et seq.*

[3] See the able opinion of Gibson, C. J., in Lighty *v.* Shorb, 3 Pa. (old Pa., not Pa. St.) 477, in this connection, though the student must be careful to consider that the Pennsylvania cases on this subject, *supra*, § 335 *et seq.*, have a peculiar local application.

[4] *Supra*, § 88.

[5] Worthington *v.* Curd, 22 Ark. 285; Busby *v.* Treadwell, 24 id. 456; Parkins *v.* Williams, 5 Cold. (Tenn.) 512; Henry *v.* Elliott, 6 Jones Eq. (N. C.) 176; De-

§ 379. Where, however, a purchaser would be entitled, at law, to defend from payment of the purchase money, either wholly or partially, and has had no opportunity of doing so, courts of equity have not hesitated to grant relief according to the peculiar circumstances of the case, by enjoining the collection of the purchase money, either temporarily or permanently, by enforcing specific performance of the covenants when necessary and possible,[1] by awarding issues of *quantum damnificatus*, or even, in some cases where the eviction has been total, by decreeing a rescission of the contract and a return of the purchase money already paid.

Thus in a case where judgment was obtained upon a bond given for the payment of the residue of purchase money, the vendor had, before the execution of the deed, which contained covenants for right to convey and of warranty, become surety upon a judgment, under which, after the execution of the deed, the use of the property for seven years was levied on and sold and possession recovered by the sheriff's vendee, "the court, upon bill, answer, and exhibits having ascertained by a writ of inquiry the damages which the complainant had sustained on account of the incumbrance, decreed a perpetual injunction against the judgment to the amount of the assessment and costs."[2]

So where after a bill had been dismissed in which the purchaser had sought to enjoin a judgment obtained for purchase money, on the ground of an anticipated eviction, another bill was filed setting forth that since the former decree the purchaser had been actually evicted under an action of ejectment, in which his vendor and himself had been co-defendants, it was held that the judgment should be perpetually enjoined.[3]

So where upon a bill filed to enforce a vendor's lien, and incidentally to enjoin proceedings at law to recover damages for a breach of the vendor's covenant of warranty, it appearing that the purchaser had been evicted by paramount title, and that his

maret *v.* Bennett, 29 Tex. 267; Wailes *v.* Cooper, 24 Miss. 232, *supra*, p. 566, n. 1.

[1] *Supra*, § 358 *et seq.*

[2] Shelby *v.* Marshall, 1 Blackf. (Ind.) 385. In Champlain *v.* Dotson, 13 Sm. & Marsh. (Miss.) 553, the court sustained a bill to enjoin the purchaser from setting up a defence at law to payment of the purchase money to a greater extent than the amount paid by him to purchase the land from one who had bought it at sheriff's sale under a paramount incumbrance. See also Morgan *v.* Smith, 11 Ill. 201.

[3] Luckett *v.* Triplett, 2 B. Mon. (Ky.) 39.

damages would exceed the amount now claimed, it was held that the bill was properly dismissed.[1]

So where in a case in New Jersey, on a bill to foreclose a mortgage given for the purchase money of land sold with covenants for quiet enjoyment, for further assurance, and of warranty, the defendants proved that the title was defective, that an ejectment had been brought of which the complainants were notified and required to defend, that judgment had been entered in favor of the paramount title and execution issued, and that the defendants, to avoid a dispossession, purchased this title, the court held that the amount thus paid should be deducted from the mortgage debt, and referred the case to a master to ascertain the damages thus due for a breach of the covenants.[2]

So in New York, where on a similar bill the defendant proved that under proceedings in partition between himself and the holders of a paramount title to an undivided part of the land, their purpart had been allotted to them, and possession surrendered by him, the court held that the defendant was entitled to a credit to the amount of the damages sustained by reason of the breach of the vendor's covenant.[3]

So in a case in Michigan, where the purchasers, having given a mortgage for land which had been conveyed to them with a covenant against incumbrances, were subsequently compelled to discharge a paramount claim, it was obviously held that they were entitled to deduct the amount thus paid from their mortgage.[4]

[1] Kingsbury *v.* Milner, 69 Ala. 502. "It requires no argument," said the court, "to show that a bill seeking to enforce such a claim is entirely destitute of equity. The bill admits the fact of defendant's eviction by paramount title and the fact of warranty, and yet seeks to enforce payment of the entire purchase money. It is in the very teeth of the fundamental principle of every court of conscience, that he who seeks equity must do equity." On the other hand, the case of Burkett *v.* Munford, 70 id. 423, *supra*, p. 637, n. 3, sufficiently shows that where there is mere absence of title and the purchaser is still in possession, the latter will be left to his legal rights.

[2] Coster *v.* Monroe Manufacturing Co., 1 Green Ch. (N. J.) 476. This case is plainly distinguishable from the later ones of Hopper *v.* Lutkin, 3 id. 149, and Glenn *v.* Whipple, 1 Beas. Ch. 50, where relief was refused.

[3] Fowler *v.* Poling, 6 Barb. 165 (see *supra*, p. 196, n. 1), overruling Fowler *v.* Poling, 2 id. 300. In Worthington *v.* Staunton, 16 W. Va. 208, a tenant in common had conveyed part of the estate by metes and bounds with covenant of general warranty, and afterwards, upon partition, a material part of the land conveyed was allotted among the other tenants in common, whereupon the court ordered the deed to be cancelled and annulled, and the parties restored to their original position.

[4] Detroit R. R. Co. *v.* Griggs, 12 Mich. 51.

In Missouri, provision was formerly

§ 380. There have been exceptional cases which have determined that although the prosecution of the adverse title may not, of itself, be a sufficient ground to entitle a purchaser to relief, yet that such prosecution, when coupled with the insolvency or non-residence of the party bound by the covenants, will bring the case within the *quia timet* jurisdiction of equity.

Thus in an early case in Virginia, an injunction was held to have been properly granted to restrain proceedings on a bond given for the purchase money of land, conveyed with a covenant of warranty, upon the allegation that a suit was actually being prosecuted under a paramount title, and that the vendor was insolvent.[1]

So in a case in Kentucky, where a purchaser's personal representatives filed a bill against the vendor to enjoin a collection by him of a judgment obtained for a balance of purchase money due by their intestate, on the ground that a judgment had been recovered against them by a subsequent alienee on the covenants of their intestate, and that the vendor was insolvent, the court

made by statute for the granting injunctions to restrain the collection of unpaid purchase money of land sold with covenants for title where there was a failure of title for the whole or any part thereof, denying relief, however, in any case where the purchaser had notice of the fact complained of before his purchase. Rev. Stats. Mo., 1845, c. 82. The provisions of the act were quoted in the fourth edition of this treatise, p. 688, n. 2, but they do not seem to be contained in the later Revised Statutes.

The case of Jones *v.* Stanton, 11 Mo. 433, *infra*, p. 644, was not decided under this statute.

In Henderson *v.* Brown, 18 Grant's Ch. (Can.) 79, which was a case of foreclosure of a purchase-money mortgage, the defendants' equity was sufficiently obvious, as he had been compelled to pay a mortgage covered by the covenant against incumbrances, but the decision seemed to rest upon the right of the purchaser to deduct incumbrances in the case of an *executory* contract of sale (as to which see *supra*, p. 42). In the subsequent case of Lovelace *v.* Harrington, 27 id. 178, a bill was filed to restrain a judgment obtained for purchase money, on the ground of the existence of an undisclosed outstanding mortgage which came within the vendor's covenant against incumbrances, and the court deemed it "plainly inequitable for a grantor who has concealed an incumbrance from a purchaser and covenanted against the existence of such incumbrance, to attempt to compel the payment of purchase money without deducting what may be due upon the incumbrance," which the court considered to be a cloud upon the title. If the case stopped here, it might be thought not in harmony with that class which denies relief unless the purchaser has paid off the incumbrance (*supra*, § 378), but the plaintiff in his bill offered *to pay into court the amount recovered by the judgment*, and the court granted the injunction upon such payment, together with the costs of the execution issued thereon.

[1] Stockton *v.* Cook, 3 Munf. (Va.) 68. For the course of decision in Virginia, where the purchase money is secured by a deed of trust, see *supra*, p. 633, note.

was clearly of the opinion that the complainants were entitled to the relief prayed for.[1]

So in Tennessee, the purchaser filed a bill to enjoin a judgment obtained on a note given for the purchase money of land, conveyed with covenants for seisin and of warranty, on the ground that his vendors had but an equitable title, and that a bill had been filed to subject the land to sale for a balance of purchase money still remaining unpaid by them, and it was held that as the vendors were admitted to be utterly insolvent the complainant was entitled to relief.[2]

So in Georgia, it was held that an injunction had been properly granted upon a bill setting forth that the complainant feared a loss of the land under prior incumbrances covered by his covenants, and that the vendor was a non-resident, and had no property within the State;[3] and in a case in North Carolina, it was

[1] Jones *v.* Waggoner, 7 J. J. Marsh. (Ky.) 144. "If the appellees," said the court, "had a legal right to the damages for which relief is sought by them, the admitted insolveney of the appellant gave jurisdiction to the Chancellor, who, when he had possession of the case by injunction, had a right to retain it, and give full and final redress by decreeing a set-off and any other relief that was proper, and who for that purpose had a right to assess the damages for a breach of the covenant without the intervention of a jury, the criterion being fixed by the contract and the law."

[2] Ingram *v.* Morgan, 4 Humph. (Tenn.) 66.

[3] Clark *v.* Cleghorn, 5 Ga. 225. In Vance *v.* House, 5 B. Mon. (Ky.) 540, it is said: "A bill for the dissolution of the contract cannot be sustained and the payment of the consideration enjoined, except in the case of fraud, insolvency, or non-residency of the vendor, and a palpable and threatening danger of immediate or ultimate loss, without legal remedy, by reason of the defects in the title conveyed, and the inability of the vendee to protect himself against eviction under it. And to sustain such a bill after the vendee has accepted the conveyance, the *onus* lies on him to establish, to the satisfaction of the Chancellor, that the defect of title and imminent danger of eviction and loss exist." See also the remarks in Woodruff *v.* Bunce, 9 Paige, (N. Y.) 444.

In Ingalls *v.* Morgan, 12 Barb. S. C. (N. Y.) 578, the purchaser filed a bill to restrain the holder of a paramount judgment from selling the land under it, on the ground that at the time of the purchase it had been agreed between the vendor and the judgment creditor that the notes to be given for the purchase money by the complainant, who was then ignorant of this judgment, should be applied by the vendor to its payment; that the first note was so applied, but that the vendor afterwards became insolvent, and the judgment creditor, in knowledge of this fact, redelivered the remaining notes to the vendor, who passed them to third persons, to whom their amount was paid by the complainant. The court was clearly of the opinion that the arrangement referred to must be regarded as an application of the notes to the payment of the judgment in satisfaction and discharge of its lien upon the land; that the purchaser therefore took the land freed from its lien, and that the retransfer of the notes to the vendor, when he was known to be utterly unable to respond in damages for a breach of the covenants in his deed, was an act of bad faith towards the purchaser, and a perpetual injunction was therefore decreed.

held that the complainant's bill could not be sustained where the defendants were within the jurisdiction of the courts of law of that State, for the reason that the law could give complete relief in an action of covenant on the warranty contained in the deed of the defendants; but as they were non-residents, the court would not permit the defendants to recover the purchase money for the land, the title to which was admitted to be defective, leaving to the plaintiff the precarious remedy of suing in the courts of another State for the purpose of getting back the same by way of damages in an action for the breach of the covenant of warranty.[1]

In a case in Missouri, a purchaser filed a bill to enjoin a judgment recovered by his vendor for a balance of purchase money of certain land sold with statutory covenants for the title, alleging that the vendor's title extended to but one half of the land, and that he was insolvent. It appeared by the proofs that the defect of title was undoubted, and that the purchaser was still in possession, but the proof as to the vendor's solvency was somewhat contradictory, and the court held that upon the whole, taking into consideration the admitted defect in the vendor's title and the just doubt existing in relation to his ability to pay his debts, they were warranted in requiring a stay of the collection of the debt until the vendor should give security to indemnify the purchaser against any loss he might sustain in consequence of the defect of title.[2] So in a later case there, while the court refused to grant the absolute relief prayed by the purchaser, yet in consideration of the vendor's insolvency, it required security to be given by him to meet the damages which might be recovered on his covenants;[3] and in a very recent case, the insolvency and non-residence of the vendor were considered to give to his purchaser a priority to reimbursement out of a fund before the court for distribution.[4]

So in a recent case in Indiana, the element of insolvency was considered to distinguish the case from others in that State and

[1] Green *v.* Campbell, 2 Jones Eq. (N. C.) 446. In the later case of Falls *v.* Dickey, 6 id. 258, the bill alleged that the vendor was a non-resident, but did not aver that he had no property in the State, and this omission was held to be fatal to his relief. See also Richardson *v.* Williams, 3 id. 116.

[2] Jones *v.* Stanton, 11 Mo. 433.

[3] Mitchell *v.* McMullen, 59 Mo. 252, citing the earlier New York cases, *supra*, p. 630, and many others.

[4] Johnson *v.* Wilson, 77 Mo. 639, reversing the decree below, which had sustained a demurrer to the petition.

elsewhere,[1] but it has also been held that this insolvency must appear in the pleadings as the ground of the relief prayed for.[2]

So in a recent case in Tennessee, where a vendor's bill was filed to enforce the lien for unpaid purchase money for lands sold with covenants for seisin and of warranty, the cross-bill, in

[1] Fehrle *v.* Turner, 77 Ind. 530. In an action to foreclose a purchase-money mortgage, the defendant filed a counter claim setting forth a suit brought and then pending under paramount title, that his vendor was insolvent, and praying an injunction till the question of title should be settled. A demurrer to this was sustained in the court below, but this was reversed on appeal, partly on the authority of Johnson *v.* Gere and other early cases (*supra*, p. 631), and the previous case of Strong *v.* Downing, 34 Ind. 300, where relief had been refused under nearly similar circumstances, was overruled.

[2] Hoppes *v.* Cheek, 21 Ark. 585 (*supra*, p. 635); Wimberg *v.* Schwegeman, 97 Ind. 528, 530, *supra*, p. 635, n. 3), where the court said: "The second paragraph of the counter claim presents an essentially different question. Counsel for appellee dispose of it by citing Strong *v.* Downing, 34 Ind. 300, but that case, upon the point to which it is here cited, was expressly overruled in Fehrle *v.* Turner, 77 Ind. 530. The rule established by the case last cited is that an injunction may be maintained to restrain the collection of purchase money in a proper case, but it is not decided that an injunction will lie in all cases where covenants are broken by a total failure of title. What constitutes a case for injunction is not defined; it is, however, held that there are cases where an injunction will lie. It is not in every case where there is a total failure of title and a breach of covenant, that a grantee in possession can maintain a suit to restrain the collection of the purchase money. In order to obtain relief by injunction, some facts showing an equity in the applicant must be stated.

"We need not, and do not, decide just what facts must be alleged in order to entitle the grantee to an injunction; we do decide that one of the material facts that must appear is the insolvency of the grantor. If the grantor is solvent, then there is a full legal remedy upon the covenants, and consequently no reason for resorting to the extraordinary remedy of injunction. The cases are well agreed upon this point. Miller *v.* Avery, 2 Barb. Ch. 582; Woodruff *v.* Bunce, 9 Paige, 443; Allen *v.* Thornton, 51 Ga. 594; Moore *v.* Hill, 59 id. 760; Yonge *v.* McCormick, 6 Fla. 368; McDunn *v.* City of Des Moines, 34 Io. 467.

"In holding that where insolvency is alleged, the grantee may restrain the collection of the purchase money, we do not adopt a doctrine new to this court, for the principle upon which it rests was laid down long since in the cases of Fitch *v.* Polke, 7 Blackf. 564; Addleman *v.* Mormon, 7 id. 31; Buell *v.* Tate, id. 55; Arnold *v.* Curl, 18 Ind. 339. These cases seem to have been overlooked in both Strong *v.* Downing, *supra*, and Fehrle *v.* Turner, *supra*, although they bear strongly upon the question, and one at least is directly in point.

"In Rickett *v.* Pratt, 48 Ind. 73, the doctrine of the cases cited was approved, and it was held that the matter must be pleaded in the suit to foreclose the mortgage, and that it could not be afterwards set up in an independent suit for injunction. Confining ourselves to the point presented, we hold that the second paragraph of the counter claim was bad, because it did not allege that the grantor was insolvent."

In McDunn *v.* City of Des Moines, 34 Io. 467, cited in Wimberg *v.* Schwegeman, relief was granted on the ground that the vendor was a married woman and irresponsible; a court of equity would, therefore, restrain her from transferring the notes given for the purchase money, lest the purchaser should suffer irreparable injury if sued upon by an innocent holder; and having thus acquired jurisdiction of the case, would grant the full relief necessary.

addition to the charge of fraudulent representation, set up in detail the alleged defects of the title and the utter insolvency of the vendor, and demanded a rescission, an account and payment for permanent improvements, or that the complainants be required to deraign and show a good title, and this was sustained;[1] and the doctrine of these cases has been recognized in many others.[2]

§ 381. But where there is no *actual prosecution* of the adverse title or incumbrance, it seems that the insolvency or non-residence of the vendor will not, when coupled with the mere *existence* of such title or incumbrance, give to the purchaser a right to equitable relief. Thus in a case in Mississippi,[3] where there was no

[1] Leird *v.* Abernathy, 10 Heisk. (Tenn.) 636. The court, reversing the Chancellor, said: "The counsel for the complainants rely upon the cases of Hurley *v.* Coleman, 3 Head, 266, and Curd *v.* Davis, 1 Heisk. 574, to sustain it. The first of these cases simply holds that upon a bill to enforce a lien for purchase money the vendor need not file the evidences of his title. The vendee cannot resist merely for an insufficient title in the vendor. This was, as we understand it, where the defence was set up by answer, and no fraud or insolvency was alleged. It is held in the same case, that if there be any controversy about the title, it must be presented by cross-bill. And we understand the latter case simply to reiterate the doctrines of the first. The general rule is, that where land is bought and a deed taken with general warranty, the vendee, in the absence of fraud, has no right to an injunction against the payment of the purchase money, or to seek in chancery a restoration of that already paid. He must rely upon the covenants of his deed. It is otherwise, where he has taken only a title bond. Buchanan *v.* Alwell, 8 Humph. 516. But a covenant of seisin made by one who has no title gives a right of action as soon as the covenant is made, and no eviction, as in covenants of warranty, is necessary, and when the vendor is insolvent, a court of equity will enjoin the collection of the purchase money. Ingram *v.* Morgan, 4 Humph. 66; Woods *v.* North, 6 id. 309. And a bill lies in such case to rescind by reason of the circumstances of fraud and imposition. Ibid. A court of equity, however, will not interpose in such case unless upon the ground of fraud, or the insolvency of the vendor, or some other distinct ground of equitable jurisdiction. Barrett *v.* Clark, 5 Sneed, 436; and to the same effect is the case of Young *v.* Butler, 1 Head, 640. The cross-bill in this case alleges both fraud and insolvency, and points out the defects in complainants' title with that particularity the law seems to require, and demands a discovery and deraignment. In such a case, a court of equity can give the relief sought in the bill, and in view of the insolvency of the vendor it is perhaps the only remedy left to defendants."

And in the later case of Saint *v.* Taylor, 12 Heisk. (Tenn.) 488, where the circumstances were similar, the court held that the complainant was entitled to a rescission of the contract, and to be placed as nearly *in statu quo* as practicable.

The peculiar ground of the decision in Woods *v.* North, 6 Humph. (Tenn.) 309, cited in Leird *v.* Abernathy, has been referred to *supra*, p. 638, n. 2.

[2] Walton *v.* Bonham, 24 Ala. 513; Wray *v.* Furniss, 27 id. 471 (see also the remarks in Cullum *v.* Bank at Mobile, 4 id. 21, *supra*, p. 566, n. 1); Busby *v.* Treadwell, 24 Ark. 458; Brooks *v.* Moody, 25 id. 452; Hatcher *v.* Andrews, 5 Bush, (Ky.) 662; Young *v.* Butler, 1 Head, (Tenn.) 648.

[3] Latham *v.* Morgan, 1 Sm. & Marsh. Ch. 618.

eviction, actual or threatened, it was held that, under the repeated decisions in that State,[1] the insolvency of the vendor could not help the position of the purchaser. So in a case in South Carolina, where the purchaser, after having been ten years in possession, was advised by his counsel that there was an outstanding title in minor children, and filed a bill for a rescission of the contract, alleging the insolvency of his vendor; upon the facts in the bill being admitted in the answer, the court held that it was impossible to assimilate the case to a bill *quia timet*.[2] So in a case in Kentucky,[3] it was held that if the insolvency of the vendor were to be a ground for equity to interfere, still a chancellor ought not to go further than to the extent to which a court of law would go in assessing damages for the part lost. If equity could interfere by reason of the insolvency of the warrantor to arrest the payment of the purchase money, or any part of it, it would be only by clear evidence of eviction or undoubted defect of title, so as to show the covenant of warranty broken,[4] and by stopping payment of so much of the purchase money as was equal to the damages incurred by the breach. So in the same State it was held that the admitted insolvency of the vendor was no ground for an injunction where one of the paramount owners, all of whom were minors, merely declared his intention of suing for the part belonging to him,[5] and the same doctrine has been announced in late cases in Arkansas.[6].

[1] The decisions referred to, however, are not given. There are *dicta* to that effect in Vick *v.* Percy, 7 Sm. & Marsh. 268, and Wailes *v.* Cooper, 24 Miss. 233. *Supra*, p. 566, n. 1.

[2] Maner *v.* Washington, 3 Strobh. Eq. (S. C.) 171. "The purchaser," said the Chancellor, "had the legal enjoyment of the land, in which he might never be interrupted; but if that contingency should occur, he had a plain and adequate remedy against the vendor for the breach of his covenant, and the possibility or even probability of his being unable to pay the damages at a future time could not create such an equity in favor of the plaintiff as to bring his case within the principles of a bill *quia timet*. Wherever the purchaser anticipated the insolvency of his vendor, he might stipulate for sureties to the warranty, but when he had taken possession of the land, paid the purchase money, accepted a deed of conveyance, and executed the contract, he could not call upon equity, except upon the ground of fraud, to rescind it, but must rely upon the covenants of his deed for redress."

[3] Rawlins *v.* Timberlake, 6 Mon. (Ky.) 225.

[4] It will be of course remembered that this covenant is only broken by an eviction, *or something equivalent to it*. *Supra*, § 132 *et seq.* And in Kentucky, it seems to have been held, in some cases, that a judgment of a court of record in favor of the paramount title was sufficient to constitute an eviction. Such a doctrine, however, does not generally prevail. See *supra*, p. 161, n. 2.

[5] Wiley *v.* Fitzpatrick, 3 J. J. Marsh. (Ky.) 583, *infra*, p. 649; Trumbo *v.* Lockridge, 4 Bush, (Ky.) 416.

[6] Worthington *v.* Curd, 22 Ark. 284; Hoppes *v.* Cheek, 21 id. 590.

So in a case in the Supreme Court of the United States, where a purchaser bought with a covenant of general warranty, and finding after the execution of his deed that a complete chain of title could not be deduced, filed a bill for the rescission of the contract, on the ground of the defective title, and in a subsequent bill of revivor against the heirs of the vendor alleged that he had died insolvent, the court below had rescinded the contract, but the Supreme Court were clearly of the opinion that unless the ground of insolvency alone was sufficient to sustain it, the decree of that court could not be upheld, and that it was not sufficient the court had no doubt,[1] and this decision has been approved in later cases in the same court.[2]

§ 382. In cases, however, where all the parties to the title are before the court — the vendor, the purchaser, and the paramount claimant — and an equitable adjustment can therefore be made of their mutual rights, the fact of insolvency or of non-residence seems to have been admitted to be material. Thus where in a case in Kentucky,[3] upon a bill praying relief against a judgment[4] for the purchase money of land sold with a general covenant of warranty, it appeared that a prior mortgage had been

[1] Patton *v.* Taylor, 7 How. (S. C. U. S.) 132. Nelson, J., after citing the cases of Bumpus *v.* Platner, 1 Johns. Ch. 213, Abbott *v.* Allen, 2 id. 519, Gouverneur *v.* Elmendorf, 5 id. 79, Simpson *v.* Hawkins, 1 Dana, 305 (*infra*, p. 650, n. 1), and James *v.* McKernon, 6 Johns. 543, said that these cases showed "that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money on the mere ground of defect of title, there being no fraud or misrepresentation; and that in such a case he must seek his remedy at law on the covenants in his deed."

[2] In Refeld *v.* Woodfolk, 22 How. (S. C. U. S.) 318, the contract was executory; Noonan *v.* Lee, 2 Black, (S. C. U. S.) 507, *supra*, p. 637, n. 2.

In Tuscumbia Railroad Co. *v.* Rhodes, 8 Ala. 206 (where many authorities are collected and examined), the complainant, being indebted to the company on an open account, the latter assigned it to a third party, who commenced suit and obtained judgment thereon. Pending the suit, the complainant paid for the company a large debt as surety for a claim existing before the assignment, and filed a bill to set off the amount thus paid against the amount of the judgment; and it was held (reversing, after reargument, its former opinion) that although independently of the insolvency of the company the complainant had no right of set-off whatever, either in law or equity, yet that its existence introduced new relations between them whereby the complainant was entitled to retain the debt due by him independent of the manner in which it was created, until the company either relieved him from or indemnified him against his obligation. See also Hupp *v.* Hupp, 6 Grat. (Va.) 310.

[3] Morrison *v.* Beckwith, 4 Mon. (Ky.) 73.

[4] There were, in fact, two judgments, but as to one of them it was held that the complainant had barred his equity by representations made by him at the time of the transfer of the security on which the judgment was founded. A similar decision was made in Jaques *v.* Esler, 3 Green Ch. (N. J.) 461.

given by a former owner of a large tract, of which this was part — that the greater part of the mortgage debt had been paid, and the mortgagor was willing to pay the balance, but the mortgagee refused to receive it till a certain suit had been determined — and the bill made both the mortgagee and mortgagor parties, together with the vendor, who it appeared was insolvent — it was held that although equity would not in general grant relief where a contract was executed, but would leave the purchaser to his action on the covenants, yet that in the case of the insolvency of the vendor it was competent for the vendee to go into equity, without intending to rescind the contract, to procure the appropriation of the purchase money to the removal of the incumbrance, and that upon this ground alone could the bill be held tenable.[1] So in a subsequent case, where a purchaser filed his bill to enjoin a judgment given for the purchase money of land sold with general warranty, on the ground that by a prior partition the more valuable portion of the land had been conveyed to one whose heirs he made co-defendants with the vendor, who was admittedly insolvent, and the court below granted an injunction, the decree was reversed on appeal, upon the express ground that no decree had been prayed for against those heirs, and that all of them had not been served with process.[2] So in a later case, it was held, after much consideration, that where the vendor was alleged to be insolvent, and there were just grounds for fearing an eviction, the Chancellor might interpose and suspend the payment of the purchase money, although the contract had been executed by a conveyance.

[1] The court held that the proper redress was not by perpetual injunction, as the complainants might thereby forever keep the estate and also this part of the purchase money, but by directing an account of the sums paid and the balance due on the mortgage, of the value of the whole estate at the date of the mortgage, and of the part sold to the complainants, so as to find the proportion of the mortgage money chargeable thereon, and by compelling either an appropriation of the purchase money to remove the incumbrance, or indemnification of the complainants by other means. This part of the opinion is given in full in the fourth edition of this treatise, p. 694, note.

[2] Wiley *v.* Fitzpatrick, 3 J. J. Marsh. (Ky.) 582. The court held that had the complainant brought the proper parties before the court, and by a prayer in his bill compelled these heirs either to insist upon and exhibit their title to the part in question, or yield it to him, the decree of the court below would have been correct, unless it should appear that their title was invalid. But the contract should, as to that part, be rescinded, if the vendor had conveyed no title to it, as it would be unjust to permit the purchaser to hold the deed for it, and yet have the injunction for the price of that part perpetuated, and leave was given to the complainant to amend his bill if he thought proper, so as to bring all the proper parties before the court.

But the court regarded it as *indispensable* that if there had been no eviction all the parties interested should be brought before the court, which could then settle their respective rights; and for want of this precaution, the decree of the court below restraining the collection of the purchase money was reversed.[1] The principle of these cases is one of general application, and has been elsewhere recognized.[2]

§ 383. And, lastly, as to the jurisdiction in the *reformation* of covenants.

It has long been settled that if by reason of fraud, mistake, or accident an instrument does not express the true intent and meaning of the parties, equity will, *upon sufficient evidence*, reform it, and carry it into execution as reformed.

The rule of the common law that parol evidence shall not be admitted to contradict or vary a written contract rests upon the ground that "The written instrument in contemplation of law contains the true agreement of the parties, and that the writing furnishes better evidence of the sense of the parties than any that can be supplied by parol. But equity has a broader jurisdiction,

[1] Simpson *v.* Hawkins, 1 Dana, (Ky.) 303. The complainants had leave granted to amend their bill as in the case last cited. The following language was held by Underwood, J., as to the complainant's equity to *rescind* the contract: "Regarding the protection which time had thrown round the vendors, perceiving no actual fraud on their part with the purchasers, and seeing that the contract has been fully executed by a formal conveyance with warranty of title against all the world, which warranty has not been broken by an eviction from the premises, and for aught that appears to us never will be, we cannot concur with the Circuit Court in a total rescission of the contract. Indeed, where contracts are executed by conveyances, we are of opinion that there can be no rescission of a contract in any case, unless it has been tainted by actual fraud. If the warranty of title has been broken, so as to entitle the vendee to damages, or if the vendee be entitled to damages upon a covenant of seisin, he may apply to the Chancellor, where the vendee is insolvent, to set off those damages against the unpaid portion of the purchase money. The ground upon which the Chancellor interferes in such cases is the prevention of the irreparable mischief which otherwise might result from the insolvency. He ought not to act upon the principle of rescinding the contract. On the contrary, he should affirm the contract, and secure to the party such damages as he might be entitled to, for a partial or total violation thereof by the obligor. If a deed of conveyance be executed for any quantity of land, and the vendee is put into possession thereafter, in case he loses half or three fourths of the land, the law only authorizes a recovery upon the warranty of damages commensurate with the loss. The Chancellor must follow the law, and not lay hold of such a partial loss, and require the vendor to take back the portion of the land saved, and return the purchase money for that, under the idea of rescinding contracts."

[2] Davis *v.* Logan, 5 B. Mon. (Ky.) 341; Denny *v.* Wickliffe, 1 Met. (Ky.) 216; Hatcher *v.* Andrews, 5 Bush, (Ky.) 561; Shannon *v.* Marselis, Saxton, (N. J.) 413; Atwood *v.* Vincent, 17 Conn. 575.

and will open the written contract to let in an equity arising from facts perfectly distinct from the sense and construction of the instrument itself." [1]

And of course this familiar branch of jurisdiction applies to covenants for title.

The real difficulty is as to the sufficiency of proof. When the true intention of the parties, however defectively expressed, sufficiently appears on the face of the instrument, of course it needs no reformation — a court will construe it according to the intention thus appearing. When the true intention does not so appear, and the parol evidence is *in aid* of other evidence, there may be

[1] Per Kent, Ch., in Gillespie *v.* Moon, 2 Johns. Ch. (N. Y.) 585. See also *supra*, § 88. For the rule of the common law, both before and since the passage of the statute of frauds (not always free from fluctuation), the student may refer to the notes to the leading case of Doe d. Hiscocks *v.* Hiscocks, Tudor's Lead. Cas. on Real Property (3d ed.), 918, and Wigram on Wills; and for the rule in courts of equity, to the notes to Woolam *v.* Hearn, 2 Lead. Cas. in Eq. (4th Am. ed.) *484.

An injunction will sometimes be used in aid of this form of relief. In Bowen *v.* Thrall, 2 Wms. (Verm.) 382, land had been agreed to be conveyed by a warranty deed containing covenants for seisin and against incumbrances, but the deed as drawn, although it contained a covenant of general warranty, yet purported to convey only the vendor's right, title, and interest, which is held in many cases to qualify and restrain a general covenant. (See Miles *v.* Catlin, 22 Verm. 104, and *supra*, §§ 250, 298.) The premises turned out to be incumbered by a mortgage previously given by the grantor, which it was proved the latter assumed to pay, but under which the mortgagee afterwards took possession of the premises. The court considered that if the deed had been drawn according to the contract between the parties, the vendor would have been obliged to pay the mortgage. As it was, the legal effect of the deed was to throw the burden of this debt upon the purchaser (see Mills *v.* Catlin, 22 Verm. 104, and *supra*, § 298, for cases where a covenant of general warranty is held to be restrained by a limited estate conveyed). At law, therefore, the latter was without adequate remedy, as the deed must there be enforced as it was drawn, and as it contained no covenant against incumbrances, the purchaser had no defence at law to the note. A court of equity would, however, protect the rights of the parties under the contract, and enforce it in the same manner and to the same extent as if the deed had been drawn as it should have been, and whatever might be the rule at law, a court of equity would not permit a grantor to recover the entire purchase money, and leave unpaid incumbrances upon the land which he was under obligations to discharge. The purchaser had a right to retain so much of the purchase money as was sufficient to secure him against the incumbrances, particularly where the grantor was insolvent, and no adequate remedy could be had on his covenants. The suit at law was therefore enjoined until the incumbrances should be removed.

And where, through mistake, the covenant is performed to the wrong party, equity will decree restitution. In Rose *v.* Schaffner, 50 Io. 483, R. had purchased land from H. with covenants, and afterwards mortgaged it to the plaintiff. On failure of title, and in ignorance of the mortgage, H. paid to D., a subsequent purchaser of the property, the amount of his liability on the covenants, whereupon the court required D. to repay so much of this amount as was necessary to protect H. from the plaintiff's claim on the covenants.

but little difficulty as to the jurisdiction; but when that which was *written* is sought to be modified and reformed merely by that which was *said*, it is easy to see that unless the proof be very clear, fraud would be more promoted than prevented by the so called reformation of contracts.

§ 384. An examination of the cases will show that although in the reports of some of them the question of evidence may not perhaps have been set forth with sufficient prominence, yet that this principle has been steadily kept in view.

In the early case of Coldcot *v.* Hill,[1] the complainant, having purchased church lands under the title of Cromwell, sold them to the defendant's testator with general covenants for the title. Upon the Restoration, the estate was avoided, and the defendant, in an action on the covenants, obtained judgment for his purchase money, upon which the vendor filed a bill to enjoin its collection, "which did suggest a surprise upon the plaintiff in getting him into that covenant, and that it was declared by Dr. Coldcot, when he sealed, and the defendant's testator, that it was intended Dr. Coldcot should not undertake any further than against himself;" and *there being proof of this*,[2] the purchaser was decreed to enter satisfaction on the judgment and pay costs.[3]

[1] 1 Cases in Chancery, 15; Freem. 173; 1 Sid. 328, *nom.* Coldcot *v.* Hide.

[2] That is to say, "Upon the hearing, it was proved that the matter of the covenant upon which the judgment was had against the plaintiff was controverted in the paper draft, and put out by the plaintiff's counsel, and in again by the defendant's counsel, with the alteration only that whereas the covenant was that the plaintiff was lawfully seised, etc., the plaintiff's counsel put out 'lawfully,' which signified nothing; for to covenant one is seised, is intended lawfully. But some proof being that it was declared upon sealing that the plaintiff should undertake for his own act only, it was decreed that the defendant should acknowledge satisfaction on the judgment and pay costs." The report also says that a like case to this between Farrer and Farrer was heard and decreed after the same manner, about six months before.

[3] "Cases in Chancery" is "notoriously a book of doubtful authority" (Wallace's Reporters, 297), but the report in Freeman (himself an unreliable reporter) is substantially the same: "Dr. Collicot, having purchased the fee of church lands, sold them with a general covenant; the church is restored, the lands evicted, the vendee brings covenant and recovers the value of the lands; the plaintiff in his bill suggests that the said covenant was gotten by surprise, and that it was agreed only that he should covenant against his own act, which appearing upon proof, the court ordered the defendant to acknowledge satisfaction of the judgment. The like between Ferrar *v.* Ferrar, about six months before." The entry in the registrar's book is, "The court, upon consideration that the covenant for enjoyment was intended only against acts done by the plaintiff or his trustees, and that the agreement to that effect was fully proved, declared the plaintiff ought to be relieved against the covenants inserted in the deeds and the

In another case, eleven years after,[1] a bill was filed to enjoin a judgment obtained upon a general covenant that the grantor had lawful power to convey, "which being contrary to the true intent and meaning of the said parties, *and it appearing so in the conveyance*, where the rest of the covenants are restrained to the acts done by the plaintiff and all claiming under him, and that the covenants ought to be so restrained, especially since the purchaser knew the plaintiff's title, and that he sold him only such estate which he had in the premises,[2] . . . the court decreed that the general words in this covenant ought not to oblige the plaintiff; being contradicted by all the subsequent covenants, and the plaintiff selling only such an estate which he had, therefore it was ordered that the defendant acknowledge satisfaction on the judgment he had obtained, and a perpetual injunction to stay all proceedings at law."[3] And upon the authority of these and other analogous cases, Sugden has said broadly, "If general covenants

judgment obtained thereon, and did therefore decree the defendant to acknowledge satisfaction on the said judgment, and to release all errors, and that no more actions should be brought on the said covenant, and for that end awarded an injunction against the defendants. The plaintiff to have his costs."

In the earlier editions of his treatise, Sugden said, "But whatever difficulty there may be of admitting parol evidence singly, yet it is always admitted when corroborated by other evidence. This doctrine was carried a great way in the case of Coldcot *v.* Hide." 1 Sugd. on Vend. (10th ed.) 262. In the 14th edition this last sentence is omitted. For two cases in which Sugden himself, while Chancellor of Ireland, exercised this jurisdiction, see Alexander *v.* Crosbie, Ll. & Goold, 145, and Mortimer *v.* Shortall, 2 Dru. & War. 363.

[1] Fielder *v.* Studley, Rep. temp. Finch, 90.

[2] "And never took any advantage or questioned the plaintiff in any of the covenants in the deed, but continued in the possession and received the profits thereof for ten years and upwards, and after the Restoration he or his son took a new lease of the Dean and Chapter of Sarum for three lives, and had a considerable abatement of the fine, in respect to the purchase made by the plaintiff."

[3] "This last case," said Sugden, "was quoted in a case in the Common Pleas before Lord Eldon (Browning *v.* Wright, 2 Bos. & Pull. 26), who thought the decision must have been made on the ground of the intent of the parties appearing on the instrument, since that intent, and the consequent legal effect of the instrument, could only be collected from the instrument itself, and not from anything *dehors*. In a still latter case in the same court (Hesse *v.* Stevenson, 3 Bos. & Pull. 575), Lord Alvanley thought, under the circumstances of the case, that the application was made to the Court of Chancery to correct the mistake, in the same manner as applications are made to that court to correct marriage articles, where clauses are inserted contrary to the intent of the parties. It seems clear, however, that the relief in this case was founded on parol evidence that the vendor *sold only such estate as he had*, corroborated as it was by the form of the deed and the subject of the contract. Such evidence was received in the prior case of Coldcot *v.* Hide, and is still clearly admissible." 1 Sugd. on Vend. (10th ed.) 262, but in the last edition (the 14th) this passage is omitted.

for title are entered into contrary to the intention of the parties, equity will, on sufficient proof, correct the mistake in the same manner as errors are corrected in marriage articles, and will relieve against any proceedings at law upon the covenants as they originally stood." [1]

§ 385. And upon this side of the Atlantic the law is equally well settled. In a very early case in Kentucky,[2] a deed which contained a limited covenant of warranty was reformed upon evidence that the grantee, at the time of its execution, objected to a covenant of such narrow extent, but yielded, upon the assurance of the draftsman and others present that the real meaning of the covenant was that if the land were lost, from whatever cause, the purchase money with interest would be refunded.[3]

So where the complainant alleged that when he sold to the defendant it was made known to the latter that a railroad company had laid its track across the land, and that damages had been paid therefor, and that certain other damages for another part of the land were to be paid to the defendant, in consideration whereof the latter was to make no claim on the covenants for title in the deed, yet that notwithstanding his agreement the defendant had sued the complainant at law upon the covenants, the court, although the answer denied the facts, considered them proved by the testimony in the case, and affirmed the decree below restraining the proceedings at law.[4]

[1] Sugd. on Vend. (14th ed.) 610. This is also said in the previous editions. And see *infra*, § 387.

[2] Coger *v.* McGee, 2 Bibb, 321.

[3] The opinion in this case fully recognizes the danger of giving "too easy an ear to the effect of parol evidence in contradicting or varying the terms of a written contract," but the evidence, as it appears in the opinion, was quite sufficient to overthrow the positive denials of the answer.

To authorize reformation in any case, all the parties to the instrument must be represented before the court. In Hicks *v.* Sheppard, 4 Lans. (N. Y.) 335, the defendant in ejectment had conveyed premises including those in suit, with covenants of warranty, and his grantees had conveyed to the plaintiff with like covenants. The defence was that the premises in suit had been included in the defendant's deed by mistake, but it was held that it could not be reformed unless the other parties to it were brought in.

[4] Taylor *v.* Gilman, 25 Verm. 413. "There can be no doubt," said the court, "that on trial of that action of covenant at law, the right of the railroad upon these premises would be considered a breach of the covenants in the deed. . . . To this general rule [the inadmissibility of parol evidence to vary the obligation created by the covenants], however, in equity, exceptions have been introduced in cases of mistake, accident, and fraud. . . . It would seem from the testimony that there is no ground for relief in consequence of any accident or mistake, for the deed and its

So in a case in Iowa,[1] the complainant conveyed land to the defendant by a deed containing printed general covenants for title, after which were written the qualifying words "claiming through or under us," and it turned out that there was a paramount mortgage created by a former owner, which was unknown to either vendor or purchaser,[2] which the defendants had been compelled to pay, and had then sued on the covenants, and upon a bill filed to reform the deed and restrain the proceedings at law, the court, having no doubt as to the sufficiency of the proof, granted the relief.[3]

So in a case in Minnesota, the defendant had contracted to convey to the plaintiff one hundred and sixty acres, part of it at once, and a certain forty-acre tract as soon as he got title from a railroad company. By a mistake, the deed and the purchase-money mortgage covered the whole hundred and sixty acres, but the title to the forty-acre tract never really passed, as the company, though they gave a deed for it to the defendant, had no title to convey. The defendant having begun a foreclosure suit, the plaintiff sued on the covenants for seisin and of right to convey, claiming a breach as to the forty acres, and praying also for an injunction against the foreclosure suit, and that his damages by breach of covenant be applied in satisfaction of his notes secured by the mortgage. The defendant set up the mistake, which, though denied by the plaintiff, was established, and the court reformed

covenants were drawn as they were, understandingly. . . . The only ground, therefore, upon which this testimony can be received, to control the legal effect and operation of these covenants, is the fraud of the party in attempting to enforce them in violation of his agreement. The evidence is regarded as sufficiently certain and clear in the proof of that contract, that the damages to be paid by the railroad for their right in the premises were to be divided between these parties in specific proportions, and that no claim was to be made on the grantor, on his covenant in this deed, for any matter arising out of that negotiation ; and evidently it was in confident reliance upon this understanding, that the grantor neglected so to qualify his covenant that no right of action should arise thereon for that matter. Regarding these facts therefore as sufficiently proved, and the bill as sufficiently setting up the fraud and asking for relief on that ground, we think the case is brought within the general rule upon which relief is granted."

[1] Crum *v.* Loud, 23 Io. 219.

[2] With the registry acts which are in force in all our States, this case is but another instance of the carelessness of conveyancing which is sometimes found.

[3] The ground of the decision was the clearly proved intention of the parties to make and receive a conveyance by quitclaim. The plaintiff had endeavored to obtain a printed form appropriate to the purpose, and being unable to do so, undertook to secure the same end by adding the words found in the deed at the close of the covenants in a deed of general warranty.

the deed and mortgage by striking out the forty acres, at the same time deducting their value, with interest, from the amount of the notes.[1]

§ 386. The same rules govern the power of a court to reform a deed by inserting covenants. Thus in a recent case in New York, there had been a verbal contract to convey with a good title and covenants. A deed without covenants was tendered and finally accepted, after a deed with covenants according to the contract had been demanded and refused. After the plaintiff had taken possession, an incumbrance unknown to both parties was discovered, and the plaintiff sought a reformation of the deed by the insertion of covenants of warranty and against incumbrances. It was held, reversing the decision at special term, that in the absence of fraud there was no legal liability on the grantor, and that equity could not relieve.[2]

§ 387. The difference between the doctrines enforced in the respective courts of law and equity as to this subject is shown in some rather recent American cases. Thus where the grantors covenanted that their heirs, executors, and administrators (not themselves) would warrant and defend the title, and the purchaser, being evicted, sued at law, it was held that the defendants were not liable.[3] The covenant was not that the grantors would defend the title, but that it would be defended by their heirs, executors, or administrators.[4] It might, however,

[1] Dorr *v.* Steichen, 18 Minn. 26. In Allen *v.* Yeater, 17 W. Va. 128, the court ordered a "storehouse and lot" to be excepted from a warranty deed, on proof of mistake.

[2] Whittemore *v.* Farrington, 12 Hun, (N. Y.) 349; s. c. on appeal, 76 N. Y. 452. "The theory of the judgment [below]," said the court, "is that the acceptance of the quitclaim deed in performance of the contract may be set aside on the ground of mistake, and the contract treated as executory, and a new performance in a different manner be decreed. The theory is ingenious, but is not founded on any legal precedent or principle." After stating the necessity of proving fraud or mistake, it continued, "If the grantor and grantee had both intended that this deed should contain covenants, and supposed at the time of its delivery that it did contain them, but through a mistake of the scrivener they had been omitted, the court might insert them; but no such case is made out here."

[3] Rufner *v.* McConnel, 14 Ill. 168.

[4] "It does not give," the opinion went on to say, "a right of action against the grantors on the loss of the title, but it provides a remedy against their legal and personal representatives. It exempts the grantors from personal liability, but it binds their descendants in respect of the estate that may be cast upon them. It is not like a covenant that a person who is not a party to the deed shall warrant and defend the title. In such a case, upon the eviction and the failure of such third person to comply with the terms of the covenant, an action might be maintained

be that it was the real intention of the parties that the grantors should warrant and defend the title, but it was not competent for a court of law to hear proof of the intention and relieve the mistake. If there were such a mistake, the plaintiff must apply to a court of equity and have the deed reformed, and when that was done, he might bring an action against the grantor and assign breaches on the covenant.[1]

So in a case in Massachusetts, where the defendants agreed to convey a tract of land to the plaintiff with a covenant that they would warrant that the same contained seven acres, and a deed was subsequently drawn with such a covenant, which, however, was afterwards fraudulently erased by the defendants without the knowledge of the plaintiff, it was held that the latter, who filed a bill to rescind the contract, was entitled to relief.[2] And in a later case, where it appeared that by a mistake of the scrivener

against the grantor. It would be sustained on the familiar principle that what a party undertakes shall be done by another, he must perform on the default of that other. But this case is essentially different. The covenant is that the act shall be performed by parties who can have no legal existence during the life of the grantors; while they survive, they can have neither heirs nor executors or administrators. The covenant postpones the remedy for a failure of the title until the decease of the grantors, or one of them. Until such an event transpires, there is no party *in esse* who can be called on to avouch the title. This is the only construction that can be put on the covenant. It is, indeed, an unusual covenant, but that does not help the plaintiff. Parties are allowed to make their own contracts."

[1] In Stanley *v.* Goodrich, 18 Wis. 505, however, where the facts were similar to those in Rufner *v.* McConnel, *supra*, this distinction does not seem to have been very carefully observed, although the case can perhaps be supported upon other grounds. Upon the petition of a covenantor to be admitted as a defendant in an action to foreclose a mortgage executed by him prior to his conveyance to the defendant, with whom he had covenanted not for himself, but for his heirs, executors, and administrators to warrant and defend the land, it was urged that as the above covenant did not bind him personally, he was not interested in the result of the action, but the court, in giving judgment for the petitioner, said: "As to the omission of the word 'himself' in the covenants of the deed, we do not dwell much upon that. There can be no doubt of the intention of the parties, and if the covenants are not technically valid at law, a court of equity, in conformity to the intention of the covenantor, will soon make them so."

[2] Metcalf *v.* Putnam, 9 Allen, 98. "Upon elementary principles," said Bigelow, C. J., "the plaintiff is entitled to have his deed reformed so that it may truly set forth the whole contract, and that the plaintiff may thus obtain the means of redressing the wrong which the fraudulent acts of the defendants have occasioned. That such redress could not be had at law is too clear to admit of debate. The plaintiff could not, in an action at law for the breach of the alleged agreement, introduce parol evidence to prove it. He would be shut out of such proof by the rule that oral evidence is inadmissible to add to or vary a written contract. It would there be said that the oral contract was merged in the deed. But equity furnishes relief in such cases, which the law is inadequate to afford."

an easement was omitted to be excepted from the general words of the covenant of warranty, it was obviously held that the covenantee was entitled to reformation of the deed and to an injunction meanwhile to restrain the covenantor from suing at law.[1]

§ 388. And even in those States in which codification has either swept away or at least modified the distinction between law and equity, and in which, therefore, the equitable doctrine would be enforced whenever otherwise properly applicable, there may arise cases in which the machinery substituted by codification may be inadequate to proper relief.

Thus in a case in New York, the complaint alleged that the defendant purchased from the plaintiff a farm, subject to a mortgage which the former agreed to pay, but by mistake the plaintiff inserted in the deed a covenant that the premises were free from all incumbrance. The mortgage being subsequently foreclosed, the defendant sued on this covenant, when the plaintiff commenced this suit and prayed that the deed be reformed and the defendant restrained from proceeding in his action on the covenant. To this the defendant demurred, upon the ground that while the former action was pending these facts could not be made the subject of a separate suit, but the court held that, as the plaintiff could not have obtained relief in the action on the covenant, he was entitled to a decree, and the judgment below dismissing the complaint was reversed.[2]

[1] Wilcox *v.* Lucas, 121 Mass. 21.

[2] Haire *v.* Baker, 1 Selden, (N. Y) 357. Foot, J., dissented on the ground that the plaintiff's contention was, he thought, cognizable as an equitable defence in the action on the covenant.

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